82-277

Office - Supreme Court
FILED
AUG 16 1982
CLERK

NO.__

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. SCOTT BASS
Counsel of Record for Petitioner
Supersonic Electronics Co.
747 Third Avenue
New York, New York 10017
(212) 751-9494

Of Counsel:
PROF. MARK F. POMERANTZ

MILTON A. BASS
JACOB LAUFER
IRVING L. WIESEN
Bass, Ullman & Lustigman

QUESTIONS PRESENTED

1. Whether the conflict among the circuits after *GTE Sylvania* should be resolved by upholding Sherman Act vertical conspiracy cases premised upon responsive action to customer complaints?

2. What is the evidentiary "field of vision" to be applied in ruling upon motions for judgment *n.o.v.*?

3. When must a Court of Appeals remand to the district court a verdict-winner's request for an opportunity to make a new trial motion based upon the exclusion of material evidence?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The parties to the proceedings are those listed in the caption.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
I. CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE POSITION OF THE SECOND AND THIRD CIRCUITS AND THAT OF THE SEVENTH AND EIGHTH CIRCUITS AS TO WHETHER A SHERMAN ACT CONSPIRACY MAY BE IMPLIED AS A MATTER OF LAW WITHOUT PROOF OF AN AGREEMENT OR CONTRACT	13
II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE "FIELD OF VISION" TO BE APPLIED TO THE EVIDENCE IN RULING UPON A MOTION FOR JUDGMENT *N.O.V.*	18
III. CERTIORARI SHOULD BE GRANTED TO ESTABLISH WHEN A COURT OF APPEALS MUST REMAND A NEW TRIAL MOTION TO THE TRIAL COURT	24
CONCLUSION	27

TABLE OF CITATIONS

Cases:	PAGE
Albrecht v. *Herald Co.*, 390 U.S. 145 (1968)	16
A.G. Rogers Co. v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980)	16
American Soc'y of Mechanical Eng'rs, Inc. v. *Hydrolevel Corp.*, ___U.S.___, 72 L. Ed. 2d 330 (1982)	18
Baer v. *Esprit de Corp.*, 1980-81 Trade Cas. [CCH] ¶63,614 (N.D. Cal. 1980)	16
Battle v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982)	13,15
Berry v. *United States*, 312 U.S. 450 (1941)	19
Bigelow v. *Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974)	21
Boeing Co. v. *Shipman*, 411 F.2d 365 (5th Cir. 1969)	20,24
Borger v. *Yamaha Int'l Corp.*, 625 F.2d 390 (2d Cir. 1980)	13
Brady v. *S. Ry. Co.*, 320 U.S. 476 (1943)	19
Brunner v. *Minneapolis, St. Paul, and Sault Ste. Marie R.R. Co.*, 240 F.2d 608 (7th Cir. 1957)	20
Cal. Computer Prods. Inc. v. *Int'l Bus. Mach. Corp.*, 613 F.2d 727 (9th Cir. 1979)	24
Carlson v. *American Safety Equip. Corp.*, 528 F.2d 384 (1st. Cir. 1976)	20
Cernuto, Inc. v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979)	13
Chesapeake and Ohio Ry. Co. v. *Martin*, 283 U.S. 209 (1931)	22
Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947)	24,25

PAGE

Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 19,22,23

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ..... *passim*

Daniels v. *All Steel Equip., Inc.*, 590 F.2d 111 (5th Cir. 1979) 14

Dehydrating Process Co. v. *A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961) 19,20

Edward J. Sweeney & Sons, Inc. v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) 13,15

Eiberger v. *Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980) 17,26

Fenner v. *Gen. Motors Corp.*, 657 F.2d 647 (5th Cir. 1981) 20

Fireman's Fund Ins. Co. v. *Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976) 20

Grayson v. *Pride Golf Tee Co.*, 433 F.2d 572 (1st Cir. 1970) 18,20

Gunning v. *Cooley*, 281 U.S. 90 (1930) 19,22

H.L. Moore Drug Exchange v. *Eli Lilly and Co.*, 662 F.2d 935 (2d Cir. 1981), petition for *cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215) .. 11,13,17, 21,26

Iacurci v. *Lummus Co.*, 387 U.S. 86 (1967) 25

Inventive Music Ltd. v. *Cohen*, 617 F.2d 29 (3d Cir. 1980) 20

Inwood Laboratories, Inc. v. *Ives Laboratories Inc.*, _ U.S.___, 72 L.Ed. 2d 606 (1982) 5

Klein v. *American Luggage Works*, 323 F.2d 787 (3d Cir. 1963) 16

	PAGE
Lavender v. *Kurn*, 327 U.S. 645 (1946)	19,22
Layne v. *Vinzant*, 657 F.2d 468 (1st Cir. 1981)	19
Matador Drilling Co., Inc. v. *Post*, 662 F.2d 1190 (5th Cir. 1981)	20
Michelman v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir. 1976)	21
Modern Home Inst. v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975)	16
Neely v. *Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317 (1967)	25
Oreck Corp. v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980)	13,14
Panter v. *Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981)	20
Pullman-Standard, Div. of Pullman, Inc. v. *Swint*, ___ U.S. ___, 72 L.Ed.2d 66 (1982)	5
Ralston Purina Co. v. *Hobson*, 554 F.2d 725 (5th Cir. 1977)	20
Red Diamond Supply Inc. v. *Liquid Carbonic Corp., 1980-81 Trade Cas. [CCH] ¶63,825 (5th Cir. 1981)*	14
Ron Tonkin Gran Turismo, Inc. v. *Fiat Distribs. Inc.*, 637 F.2d 1376 (9th Cir. 1981)	14
Russell v. *United Parcel Serv., Inc., 666 F.2d 1188 (8th Cir. 1981)*	20
Schwimmer v. *Sony Corp. of America*, 1980-81 Trade Cas. [CCH] ¶63,580 (E.D.N.Y. 1980)	18
Schwimmer v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982)	*passim*
Schwimmer v. *Sony Corp. of America*, 1980-81 Trade Cas. [CCH] ¶63,766 (E.D.N.Y. 1981)	*passim*
Simblest v. *Maynard*, 427 F.2d 1 (2d Cir. 1970)	21

PAGE

Simpson v. *Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967)..... 20

Simpson v. *Union Oil of Cal.*, 377 U.S. 13 (1964) 16

Sonnentheil v. *Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899)..... 22

Spray-Rite Service Corp. v. *Monsanto Corp.*, ___F.2d ___, 1982-2 Trade Cas. [CCH] ¶64,808 (7th Cir. 1982)..... 13,14

Spurlin v. *Gen. Motors Corp.*, 528 F.2d 612 (5th Cir. 1976)..... 20

Stone v. *New York, Chicago & St. Louis R.R. Co.*, 344 U.S. 407 (1953) 19

Tennant v. *Peoria and Pekin Union Ry. Co.*, 321 U.S. 29 (1944) 19

Unijax, Inc. v. *Champion Inc.*, 1982-2 Trade Cas. [CCH] ¶64,814 (2d Cir. 1982) 23

United States v. *Generes*, 405 U.S. 93 (1972)..... 25

United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)..... 16

Valley Liquors, Inc. v. *Renfield Importers, Ltd.* ___ F.2d ___, 1982-2 Trade Cas. [CCH] ¶64,744(7th Cir. 1982) 13,15

Venture Technology Inc. v. *Nat'l Fuel Gas Co.*, ___ F.2d ___, No. 81-7069 (2d Cir. July 26, 1982)..... 13,23

Webb v. *Illinois Cent. R.R. Co.*, 352 U.S. 512 (1957).. 19

Westinghouse Electric Corp., v. *Cx Processing Laboratories*, 523 F.2d 668 (9th Cir. 1975)..... 16

Wilkerson v. *McCarthy*, 336 U.S. 53 (1949) 19,24

PAGE

Statutes

Sherman Act, 15 U.S.C. §15 ..... *passim*

Rule 50, Federal Rules of Civil Procedure ..... *passim*

Rule 403, Federal Rules of Evidence 26

Other Authorities

P. Areeda, *Antitrust Analysis* 53 (2d Ed. 1974) 17

Bagalay, *Directed Verdicts and The Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053 (1964) 23

Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903 (1971) 23

James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218 (1961) 23

Louis, *Post-Verdict Rulings on the Sufficiency of the Evidence: Neely* v. *Martin K. Eby Construction Co. Revisited*, 1975 Wisc. L. Rev. 503 (1975) 25

J. Moore and J. Lucas, 5A Moore's Federal Practice (2d Ed. 1982) 24

Rosch, Conspiracy Law Breakthroughs, 50 Antitrust L.J. 347 (1982) 14

L. Sullivan, *Handbook of the Law of Antitrust* (1977) 16

9 C. Wright & A. Miller, Federal Practice and Procedure (1971) 20,21,23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The following opinions of the Court of Appeals and of the district court are set forth in the appendices in chronological order:

The opinion of the district court denying Sony's motion for summary judgment is reported at 1980-81 Trade Cas. [CCH] ¶63,580 (1980) and is set forth in Appendix A.

The opinion of the district court denying Sony's motion for judgment *n.o.v.* is reported at 1980-81 Trade Cas. [CCH] ¶63,766 (1981) and is set forth in Appendix B.

The opinion of the Court of Appeals reversing the denial by the district court of Sony's motion for judgment *n.o.v.* is officially reported at 677 F.2d 946 (2d Cir. 1982) and is set forth in Appendix C.

The order of the Court of Appeals denying Supersonic's motion to modify the judgment to remand for a new trial motion, not officially reported, is set forth in Appendix D.

The order granting Supersonic's motion to correct certain factual statements in the opinion of the Court of Appeals, not officially reported, is set forth in Appendix E.

The judgment entered by the Court of Appeals is set forth in Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 3, 1982. Petitioner filed a motion to amend the Second Circuit's judgment to remand for a new trial motion. The motion was denied without opinion on June 30, 1982. This Court granted petitioner's motion for an extension of time in which to file the instant petition. The order granting the extensions is dated July 23, 1982, and provides for an extension until August 16, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal statutory provisions involved are:

(a) Section 1 of the Sherman Act, 15 U.S.C. §1, which states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof,

shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(b) Rule 50 of the Federal Rules of Civil Procedure, which provides, in relevant part:

> **(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> **(c) Same: Conditional Rulings on Grant of Motion.** (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or

denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a conflict among the Courts of Appeals as to whether concerted action is still implied as a matter of law under § 1 of the Sherman Act, 15 U.S.C. § 1, or whether a "contract or agreement" is now required. The conflict arose because of a change in legal standards adopted by two circuits after this Court's decision in *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The Second Circuit in this case joins the Third Circuit in holding that, as a matter of law, no "combination or conspiracy" can be established solely by proof that a manufacturer takes action to stop price-cutting in response to pressure from non-price-cutting customers.

The Seventh and Eighth Circuits have explicitly rejected these holdings and have ruled that proof of acts such as termination in response to competitor complaints is sufficient evidence of concerted action under Section 1. These circuits base their holdings on earlier decisions of this Court. Because the conflict involves a heavily-litigated question which has been addressed by a number of circuits, and because important legal and economic policies are at issue, the conflict should be resolved by this Court.

This case additionally presents the opportunity to dispel the confusion among the circuits concerning the standard for appellate review of jury verdicts. The Second Circuit has joined a number of other circuits in holding that it may review *all* evidence presented at trial, and that it may disregard the verdict-winner's proof if it is contradicted by any other testimony. Other circuits follow a more restrained practice. Resolution of the issue will have a significant impact on the question of how meaningful the role of the jury remains. This Court recently spoke on the limits of appellate review of bench trials.[1] A pronouncement on jury trials is needed.

A. The Proof At Trial

Until 1975, Sony Corporation of America ["Sony"] enforced resale price restrictions on its customers. It did so under the umbrella of the Fair Trade Laws. [Tr. 142][2] At the end of 1977, claiming that it was protected by *Continental T.V.* v. *GTE Syl-*

---

[1] *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, ___U.S. ___, 72 L. Ed. 2d 606 (1982); *Pullman-Standard, Div. of Pullman, Inc.* v. *Swint*, ___U.S. ___, 72 L. Ed. 2d 66 (1982).

[2] "Tr." refers to pages of the trial transcript.

The Fair Trade Laws enacted in many states permitted resale price maintenance. These laws were repealed by Congress in 1975. 15 U.S.C. § 1.

vania, Sony accomplished the same result by imposing a new dealer contract which prohibited transshipping [Tr. 578].[3]

In the interim period between April, 1975 and the end of 1977, Sony pursued similar anti-competitive measures on a covert basis. The jury found that during that time Sony had "combined and conspired with certain of its dealers and distributors to discourage transshipping and discounting."

The "certain dealers" were key accounts such as department store chains and dealer buying groups.[4] The sudden elimination of fixed prices had resulted in widespread discounting of Sony products and precipitated a crisis with a number of these accounts. Sony began to receive regular complaints from Macy's, Bloomingdale's, Gimbels, Federated Department Stores, and others who sold goods at or around Sony's suggested prices. They met frequently with top Sony executives and requested that Sony take some action to insulate them from competition from transshippers.

The transshipping problem was constantly raised at regional sales meetings, general managers' meetings, and official headquarters meetings within Sony. Some Sony executives felt that holding the credit lines of large transshippers to an artificially low level would help, for it was a "legal way to maintain stability." [Tr. 228]. Accordingly, Sony froze the credit limits of certain large New York area transshippers, including Supersonic Electronics Co. ["Supersonic"], a dealer that had achieved three million dollars in sales in its first year as a Sony customer [Tr. 418].

The executives also decided to introduce special "shelter models", which Sony offered to a select group of non-discounting

---

[3] "Transshipping" refers to the sale by one dealer to another dealer, usually in a different geographic area, and always at heavily-discounted prices. Sony believed that the *GTE Sylvania* decision permitted resale restrictions if it could assert business justifications for those restraints. [Tr. 875].

[4] Each buying group was comprised of scores of independent dealers who benefited from volume discounts and other group buying advantages. There may have been a handful of transshippers among the hundreds of dealers in these groups. It was undisputed that some of the most vociferous anti-transshipping complaints came from the buying groups [Tr. 331].

national accounts. Both Federated Department Stores and Macy's had pushed Sony to adopt this procedure as a measure to counter "price erosion". [Tr. 464].[5]

At or about the same time, Sony gave major discounts and extended payment terms on two important television models to select national accounts, because these accounts "would advertise the merchandise at full retail price." [Tr. 653]. Sony also moved 1000 popular television models out of the New York area because:

> "[I]f we were concerned about price deterioration on new merchandise . . . and that if the complaints were that . . . there was discounting and price erosion on these models, that perhaps if he [the New York area manager] didn't have these models in the market place this would not happen." [Tr. 482][6]

During this time period, Sony's vice-president, Ray Steiner, promised an Abraham & Straus executive that Sony was "working on programs to help him out . . . and that there were going to be changes in our program to help reduce the transshipping and price-cutting. We are going to have some stability."[7]

At the same time, Vernon Brisson, another Sony executive, promised one complaining Texas dealer that:

> "[W]e will try to help you in every possible way with the marketing problems you are experiencing.
>
> * * *
>
> "As for the account in Yonkers, N.Y., who is supposedly shipping to the Texas area, I have been unable to

---

[5] The Second Circuit found this to be responsive to the customers' pressure, but discounted the evidence on the basis that the shelter model program was not successful. [App. C, p.23c]. The court also stated that there was other testimony that could contradict this proof, such as the "appearance" that other models were not kept from transshippers at the time.

[6] Sony also put one salesman in charge of all New York-area transshippers, paid him no commission, and only partially filled his customers' orders.

[7] The Second Circuit discounted this first-hand testimony, which came from the former head of Sony's New York region, because it was "not confirmed" by other participants. [App. C, p.6, n.4].

> gather any information on this account. To the best of my knowledge, we do not sell this particular account."
>
> "We shall continue to exert all effort to aid you to improve your market conditions." [App. C, p.19c, n.12][8]

Certain customers informed Sony that more was needed. At least one customer stopped purchasing for some time.[9] By the end of 1976, Sony's executives discussed steps which they characterized as "not legal."[10] [Tr. 550]. As a Sony employee explained:

> "Harvey [Schein, Sony's President] gets upset [at headquarters meetings] because he feels the transshipper is taking the business away from the department stores. He says how the hell could the department stores sell when they can't advertise the price. . . . So Harvey feels that *if we put the clamps on the transshippers*, . . . then the department stores would buy more from us. . . ." [emphasis added] [Tr. 1194 (tape)].

Sony's vice-president then clarified that "the clamps" were already being applied:

> "Ray Steiner says . . . we just can't do it overnight, but *we are slowly putting the pressure on . . . to slow them down*. We just can't kick out the business right away." [emphasis added] [Tr. 1194 (tape)].

As time passed, Sony's "clamps" on transshipping grew tighter. After receiving complaints about Supersonic's marketing practices, Sony forced Supersonic in early 1977 to agree not to

---

[8] The Second Circuit held that neither the letter nor Mr. Brisson's effort to search for the identity of the violator was "action", and was therefore not evidence of conspiracy. [Appendix C, p.20, n.13].

[9] Abraham & Straus. According to Sony's former president, Gimbels also stopped purchasing for some time. [Tr. 879]. Macy's, not satisfied with shelter models, sold its own line in addition to selling Sony [Appendix C, p.20]. The Second Circuit used this evidence to negate all of the conspiracy proof. There is a question as to whether the reverse inference may be taken from this evidence.

[10] One Sony witness claimed that:

"If anything happens everything is verbal, they won't give it to me in writing. They're going to say I never said it, and I am going to say I never heard it." [Tr. 420].

ship to Florida as a condition of receiving more merchandise. [Tr. 313]. Thereafter, Supersonic was instructed not to sell outside the New York area, and, in a tape-recorded conversation, two Sony executives agreed that, if they got "any static that he's out of his market," then they would "clamp him up completely." [Tr. 316]. By the end of 1977, in response to customer pressure [Tr. 568], Sony instituted its anti-transshipping contract.

The Second Circuit found that with respect to all complaints, "the evidence was that Sonam responded that it could do nothing to restrict transshipping" [Appendix C, p. 19].

In mid-1977, Supersonic, along with eight other New York area transshippers and discounters, was suspended by Sony. The circumstances of the suspension were exhaustively litigated at trial, where the dispute centered about Sony's claim that Supersonic had been suspended for claiming advertising credits[11] for ads that in fact had never run. Supersonic countered with evidence indicating that months earlier Sony's president, Harvey Schein, had decided to go after a handful of transshippers under the pretext of a "spot check" of advertising credit claims. The investigation was expanded to two more transshippers, and, ultimately, to another two who used the same advertising agency. The district court summarized the proof on this issue and concluded that:

> "[I]n the early part of 1977 Sony, though it had not uniformly enforced its cooperative advertising program in the past, chose to enforce it against nine transshippers whom it suspended for a period of up to two months for making claims for advertising which did not run.
>
> "Sony had not previously suspended a customer for making such advertising claims. Nor had it required any

[11] Sony offered merchandise credits to dealers if the dealers submitted forms claiming that Sony advertising had been run by the dealer. A major portion of the trial was devoted to Supersonic's proof that Sony executives did not care if advertising was actually performed. Rather, the credits were viewed as an additional discount.

customer to submit affidavits[12] concerning its role in the making of such claims. To be sure, as Sony claims, the nine suspensions were made where it appeared that all nine had dealt with a single advertising agency and that Sony employees were involved in the scheme. But the jury was not required to infer that this was the only reason that Sony decided to institute the investigation and the suspensions while not taking similar action in other instances where advertising had not been shown to have run. The jury could also infer from the distaste with which Sony officials viewed transshipping and from their previous actions and their words (in particular those taped by Sadowy) that the suspensions were a signal and a warning to transshippers and a means of putting pressure upon them." [App. B, p. 36]

Sony suspended the transshippers and made no offer to resume sales.[13] It required affidavits from the transshippers in addition to repayment. Supersonic, knowing why Sony asked for the affidavit and not believing that Sony would resume sales absent a binding assurance, refused to give Sony the affidavit or money.[14] Supersonic requested further sales, but Sony refused.

In June, 1977, Supersonic filed this lawsuit alleging, *inter alia*, a violation of Section 1 of the Sherman Act. The jurisdictional bases for the claim were Section 4 of the Clayton Act, 15 U.S.C. § 15 and 28 U.S.C. §§ 1331 and 1337.

---

[12] Facts which were not admitted into evidence explained Sony's reasons for requiring affidavits. Sony relayed these affidavits to the District Attorney's office for action. However, when the District Attorney suggested that Sony may have knowingly failed to enforce its cooperative advertising program, Sony refused to cooperate any further and the investigation was dropped.

[13] Sony first wrote to the dealers about possible reinstatement weeks after the suspensions. Sony eventually rehired seven of the nine dealers up to two months later. The eighth was initially rehired and then terminated two months later. By the end of 1977, all of the remaining transshippers were forced to sign a new agreement which prohibited transshipping.

[14] The district court explicitly found Supersonic's refusal to be "not unreasonable." [App. A, p.5a; B, p.3b].

B. The Jury Verdict

At the conclusion of the trial, the jury returned a verdict in favor of Supersonic for over $2 million dollars after trebling, exclusive of attorney's fees and costs. In a series of special interrogatories, the jury responded that in the years 1976 and 1977, Sony had "engage[d] in a combination or conspiracy with certain of its dealers and distributors to discourage transshipping and discounting." The jury also specifically found that Supersonic was terminated by Sony pursuant to that combination or conspiracy.

C. The Decision of the District Court

Following the trial, Sony moved for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b), raising principally the contention that Supersonic's termination had nothing to do with complaints Sony had received about transshipping and discounting. District Judge Eugene Nickerson, who presided at trial, denied the motion with a written opinion. [App. B]. As noted earlier, Judge Nickerson concluded that the jury could properly have found that the suspension of Supersonic and other transshippers was a means of "putting pressure upon them."

The trial court further held that there had been sufficient evidence that Sony's actions against price-cutters had been motivated by customer complaints to Sony, and by Sony's "consequent desire" to curb transshipping. Judge Nickerson concluded that "this is [not] a case where the evidence is of complaints without proof of a response by the defendant." [App. B, p. 3b]

D. The Decision of the Court of Appeals

On May 3, 1982, the Second Circuit reversed the judgment of the District Court and held that the trial judge should have granted Sony's motion for judgment *n.o.v.* [App. C]. After reviewing some, but not all, of the evidence, the Court quoted at length from its own recent decision in *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, 622 F.2d 935 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215), and held that Supersonic had failed to establish that Sony had conspired with any of the complaining dealers. According to

the Court, actions taken by a manufacturer in response to dealer complaints about price-cutting do not constitute a "combination or conspiracy" absent some further proof of "agreement" between the manufacturer and its dealers.

The Appellate Court did not reject the finding of the trial court that Sony's actions against the transshippers had been motivated by the complaints of other customers; indeed, Judge Kearse stated that there was some evidence of response [App. C, p.6, n.4; 22]. Rather, focusing on the supposed requirement of an "agreement", the Court parsed the proof and held that no such "agreement" had been established.[13]

Nor did the Second Circuit disturb Judge Nickerson's finding with respect to Sony's motive for the suspension of the transshippers [p. 9, *supra*]. The Court did not discuss that issue.

Finally, the Second Circuit reached its factual conclusions on the basis of a review of all the evidence presented by both sides. While not addressing the question directly, the Second Circuit declined to follow the standard of review adopted by the trial court, which was that: "the jury was not required to accept any of the testimony of Sony's executives and employees as to their motives or indeed as to any other fact not established by documentary evidence."

The Second Circuit ordered entry of judgment for Sony. Supersonic later moved to have the case remanded to the district court for consideration of a motion for a new trial based upon two important items of proof that had been excluded at trial. The panel denied the motion to modify the judgment without argument or opinion on June 30, 1982.

---

[13] It is not our purpose in this petition to raise issues arising out of each of the omissions and factual errors in the Court's opinion. The Court's liberties with the facts, however, and its willingness to indulge in all inferences against the jury's verdict, bespeak a deeper philosophy which runs through all of the court's recent opinions in this area. It also brings to bear serious questions about the latitude of appellate review. *See* Part II, *infra*.

REASONS FOR GRANTING THE WRIT

I.
CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE POSITION OF THE SECOND AND THIRD CIRCUITS AND THAT OF THE SEVENTH AND EIGHTH CIRCUITS AS TO WHETHER A SHERMAN ACT CONSPIRACY MAY BE IMPLIED AS A MATTER OF LAW WITHOUT PROOF OF AN AGREEMENT OR CONTRACT

This case presents a conflict in the circuits that has arisen subsequent to, and because of, the decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In the five years since *GTE Sylvania* was handed down, there has been a plethora of circuit court decisions examining anew the issue of what constitutes a vertical conspiracy under Section 1 of the Sherman Act.[16] Some of the courts have read *GTE Sylvania* as a signal to eliminate a large portion of vertical conspiracy cases.[17]

One method that the courts have used to accomplish this result has been the imposition of a new stringent requirement for proof

---

[16] *See, e.g., Second Circuit: Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980); *Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390 (2d Cir. 1980); *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*; *Venture Technology, Inc.* v. *Nat'l Fuel Gas Co.*, ___F.2d ___, No. 81-7069 (2d Cir. July 26, 1982).

Seventh Circuit: Spray-Rite Service Corp. v. *Monsanto Corp.*, ___F.2d ___, 1982-2 Trade Cas. [CCH] ¶64,808 (7th Cir. 1982); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, ___F.2d___, 1982-2 Trade Cas. [CCH] ¶64,744 (7th Cir. 1982).

Eighth Circuit: Battle v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982).

Third Circuit: Cernuto, Inc. v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

[17] *GTE Sylvania* overruled the *Schwinn* doctrine, under which a great number of conspiracy cases had been brought. *GTE Sylvania* dealt primarily with the Rule of Reason treatment of conspiracies rather than with the definition of concerted action. However, the Court dealt extensively in *dicta* with the economic impact of vertical restraints. It is from this portion of the opinion that the lower courts appear to have drawn this signal.

of concerted action.[18] The Second and Third Circuits in particular have followed such a course.

In this case, the Second Circuit stated that there was: (a) "ample" proof of pressure from Sony's non-price-cutting customers [Appendix C, p.18c]; (b) evidence of Sony executives' desire to eliminate price-cutting or transshipping and of their actions taken to avoid "price erosion" [Appendix C, pp. 18c; 22]; and (c) testimony "indicating that a [Sony] executive responded . . ." [Appendix C, p.6, n.4] to customer pressure. The court nonetheless held that this and other responses to the complaints did not, as a matter of law, constitute concerted action because of the alleged absence of "any agreement between Sonam [and the customers] on the elimination of transshipping." [*Id.*][19]

The *Sony* holding conflicts with recent decisions in the Seventh and Eighth Circuits.[20] The Seventh Circuit, in *Spray-Rite Service Corp.* v. *Monsanto Co.*, ___F.2d ___, 1982-2 Trade Cas. (CCH) ¶64,808 (7th Cir. 1982) [reproduced in Appendix G], held that a vertical "combination or conspiracy" is still implied as a matter of law in the fact pattern presented here. The *Spray-Rite* court upheld a jury finding that Monsanto had "conspired with some of its distributors to fix the resale price of Monsanto herbicides," *i.e.*, a "general conspiracy" of the same nature as that in *Sony*:

---

[18] One commentator recently claimed that the effect of *GTE Sylvania* is that lower courts are deciding for themselves what is "logical" in vertical restraint cases, and mentioned that this trend can be found in ". . . recent decisions concerning proof of conspiracy in the context of vertical restraints." Rosch, Conspiracy Law Breakthroughs, 50 Antitrust L.J. 347, 352 (1982).

Another way in which this result has been accomplished has been the imposition of a draconian standard of proof of interbrand competitive effect under the Rule of Reason. *See, e.g., Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981); *Oreck Corp.* v. *Whirlpool Corp.*, *supra*; *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 1980-81 Trade Cas. (CCH) ¶ 63,825 (5th Cir. 1981); *Daniels* v. *All Steel Equip., Inc.*, 590 F.2d 111 (5th Cir. 1979).

[19] The word "agreement" is used at least ten times in the course of Judge Kearse's legal discussion.

[20] This position was taken by appellant in *Spray-Rite* in its Petition of Defendant-Appellant Monsanto Company for Rehearing, With Suggestion That Rehearing Be En Banc at p.3 (filed July 12, 1982).

> "Monsanto argues that evidence of price complaints coupled with evidence of termination in response to those complaints is insufficient to prove the existence of a resale price maintenance agreement. It relies on *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, [3d Cir.] . . .
>
> ". . . In *Battle* v. *Lubrizol Corp.* . . . , the Eighth Circuit declined to follow *Sweeney* and held 'that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action.' *Id.* at 991 (emphasis in original). We agree."[21] [App. G, p. 15g] [footnote and citations omitted]

The Eighth Circuit so held in *Battle* v. *The Lubrizol Corp.*, 673 F.2d 984, 991 (8th Cir. 1982). As the *Battle* court emphatically stated:

> "[W]e do not agree that 'even if appellants had demonstrated that Texaco's actions were in response to these complaints, such evidence would not show the necessary concerted action.' " 673 F.2d at 991.

In this case, the Second Circuit explicitly agreed with the Third Circuit's holding in *Sweeney*. [App. C, p. 18c]. Thus, both circuits now require more than a causal link between complaints and response in order to establish a conspiracy.

---

[21] The court continued in its analysis to explain that:

"[A] terminated distributor presents sufficient evidence to support a verdict in its favor by proving (1) that the manufacturer received price complaints from the distributor's competitors, (2) that the manufacturer was concerned about raising its wholesale price and recognized that its ability to do so might be influenced by the distributor's prices, and (3) that the manufacturer terminated the distributorship." [App. G, p.16g].

In its Petition for Rehearing, Monsanto cites to an out-of-context sentence in the opinion and claims that the Seventh Circuit held that evidence of complaints followed by a termination, *without* proof of response, constitutes a conspiracy as a matter of law. As the above quotation indicates, that was not the holding. *See also Valley Liquors, Inc.* v. *Renfield Importers Ltd.*, ___ F.2d ___, *1982-2 Trade Cas. (CCH) ¶64,744 at 71,068 (7th Cir. 1982)*, where the Seventh Circuit so stated one month earlier in *dictum*.

The position adopted by the Second and Third Circuits runs counter to Supreme Court decisions. Under this Court's precedent, Section 1 does not require proof of any agreement; rather, the law implies a "combination or conspiracy" when a manufacturer, for anticompetitive reasons, takes action to limit discounting in response to customer requests for such action. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960):

> "[A]n unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." 326 U.S. 43.

See also Albrecht v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil of California*, 377 U.S. 1 (1964); L. Sullivan, *Handbook of the Law of Antitrust* §139 (1977).[22]

The Second and Third Circuits have thus added one further requirement to this formulation: that of a contract or similar agreement. In so doing, those circuits have also rejected the long line of conspiracy decisions based upon a manufacturer's "mere receipt of complaints."[23] Historically, these decisions held that something more than the receipt of complaints was needed in order to establish a "combination". Complaints and responsive action were, in accordance with this Court's teaching, held to constitute the necessary proof as a matter of law. Under the Second Circuit's ruling, this fundamental conspiracy principle has been effectively nullified.

---

[22] "If the manufacturer received reports from retailers about the pricing policies of others and implied to them that it will take appropriate action, it will have done 'something more' than merely to announce its policy and then refuse to deal." *Id.* at 395.

[23] *See, e.g., Modern Home Institute* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975); *Westinghouse Electric Corp.* v. *CX Processing Laboratories*, 523 F.2d 666 (9th Cir. 1975); *Klein* v. *American Luggage Works*, 323 F.2d 787 (3d Cir. 1963); *Baer* v. *Esprit de Corp.*, 1980-81 Trade Cas. [CCH] ¶ 63,614 (N.D. Cal. 1980); *A.G. Rogers Co.* v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980).

The effect of the Second Circuit's approach is sharply illustrated by the fact that the court was able to disregard undisputed evidence of a conspiracy. Sony's requirement that Supersonic agree not to ship to Florida, a requirement to which Supersonic was forced to adhere, was not ever mentioned by the court, much less acknowledged as proof of conspiracy itself.

The additional requirement imposed by the Second Circuit also permitted that court to ignore the otherwise dispositive evidence of conspiracy in *Sony*.[24] This conclusion is borne out by Judge Kearse's distinguishing of her earlier opinion in *Eiberger* v. *Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980), where the court upheld a Section 1 conspiracy finding. *Eiberger* involved the same Sony management involved in this case. It too concerned restrictions against transshipping. And it covered a time period overlapping with that in the *Schwimmer* case. Judge Kearse held that *Eiberger* was different because "there was no question that there existed . . . contracts within the meaning of Section 1." [App. C, p.20c, n.13]. That is because in *Eiberger*, Sony utilized a warranty fee program contained in its dealer contract to effect its unlawful vertical restraints, whereas in *Schwimmer* Sony's covert activities were all "verbal".

This conflict among the circuits concerns an important and heavily-litigated issue. *See* P. Areeda, *Antitrust Analysis* 553 (2d Ed. 1974). It also brings to bear a drastic shift in the function of the appellate court in that the jury's role as the decision-maker no longer extends to finding "combinations or conspiracies" from inferential proof.[25]

Inherent in this conflict is also a recognition by some courts of the practical consequences wrought by the Second Circuit rule. It is rare in today's sophisticated business environment to find written contracts fixing prices or allocating territories. Indeed, it

---

[24] The Second Circuit did not acknowledge, for example, Sony's requirement that Supersonic cease its sales to Florida; Ray Steiner's admission that pressure was already being "slowly" applied; Harvey Schein's decision to put "clamps" on the transshippers; and Judge Nickerson's explicit finding that this was not a case "of complaints without proof of a response by defendant." [App. B, p.3b].

[25] We respectfully direct the Court to the Petition for a Writ of Certiorari in *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, *supra*, at pages 13-22.

was Sony itself that reminded the jury that "if anything happens, everything is verbal." If the issue is not resolved, it will be the law that a manufacturer may fix resale prices as long as it does not enter into formal contracts or agreements with its customers.

We respectfully submit that a writ of *certiorari* should be granted. The issue has received significant recent attention from a number of circuits and is ripe for review. The precepts which continue to underlie the Sherman Act should not be permitted to be undermined. *See American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, ___U.S. ___, 72 L.Ed. 2d 330, 342-43 (1982).

II.
CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE "FIELD OF VISION" TO BE APPLIED TO THE EVIDENCE IN RULING UPON A MOTION FOR JUDGMENT N.O.V.

Petitioner respectfully urges this Court to close a major gap and resolve the uncertainty in a critical area of federal practice. The Second Circuit has adopted and applied the most controversial of three conflicting rules used by the courts in defining the "field of vision"[26] as to what evidence may be considered upon Rule 50(b) *j.n.o.v.* motions.

The district court held in this case that the evaluation of the evidence must be limited by the fact that the jury was not required to accept any of the interested, contradicted, or impeached testimony of Sony's executives and employees.[27] Under the so-called "all the evidence" standard, however, the Second Circuit held that such testimony must be considered, and it set aside the jury verdict on the strength of that testimony. Unless reversed, the action by the Second Circuit threatens to undermine the role of the jury under the Seventh Amendment as the

---

[26] *Grayson* v. *Pride Golf Tee Co.*, 433 F.2d 572, 576 (1st Cir. 1970).

[27] *Schwimmer* v. *Sony*, 1980-81 Trade Cases ¶ 63,766 at p.78,088 (E.D.N.Y. 1980) [App. B, p.3b]

sole arbiter of the credibility of witnesses and the weight of the evidence.

This Court's approach to the "field of vision" issue was expressed in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949):

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Id.* at 57.[28]

Under *Wilkerson*, the reviewing court on a *j.n.o.v.* motion is not permitted to consider testimony or other evidence offered by the verdict-loser which is inconsistent with the jury verdict. Only evidence which supports the verdict-winner is considered. However, it has been more than 20 years since this Court last addressed this issue.[29] As a result, significant conflicts and confusion have developed among the circuits with respect to the applicability of the *Wilkerson* standard.

Some courts have unilaterally expanded the "field of vision" to permit consideration of more than just the verdict-winner's evidence, but only to the extent that such additional evidence is uncontradicted, unimpeached and comes from disinterested witnesses.[30] *Layne* v. *Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981);

---

[28] *See also Webb* v. *Illinois Cent. R.R. Co.*, 352 U.S. 512, 513-514 (1957); *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946).

[29] Between 1930 and 1962 this Court dealt extensively with the criteria for ruling upon motions for a directed verdict or judgment *n.o.v.* *See, e.g., Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930); *Berry* v. *United States*, 312 U.S. 450, 452 (1941); *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479 (1943); *Tennant* v. *Peoria and Pekin Union Ry. Co.*, 321 U.S. 29, 34-35 (1944); *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949); *Stone* v. *New York, Chicago & St. Louis R.R. Co.*, 344 U.S. 407 (1953); *Webb* v. *Illinois Cent. R. Co.*, 352 U.S. 512, 513-514 (1957); *Continental Ore Co.* v. *Union Carbide*, 370 U.S. 690, 696 n.6, 701 (1962).

[30] Courts which have done so attempt to bypass the *Wilkerson* rule by limiting *Wilkerson* to its own facts, *i.e.*, actions brought pursuant to the Federal Employers' Liability Act (FELA). *See, e.g., Dehydrating Process Co.* v. *A.O. Smith*, 292 F.2d 653, 656 n.6 (1st Cir. 1961). The validity of this approach has been questioned:

Carlson v. *American Safety Equipment Corp.*, 528 F.2d 384, 385 (1st. Cir. 1976); *Grayson* v. *Pride Golf Tee Co.*, 433 F.2d 572, 576 (1st. Cir. 1970); *Dehydrating Process Co.* v. *A.O. Smith Corp.*, 292 F.2d 653, 656 n.6 (1st Cir. 1961).[31]

The Fifth Circuit, however, has held that the courts are free to consider "all the evidence". *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374-5 (5th Cir. 1969). Under this standard, the verdict-loser's evidence must be considered even if it is contradicted, impeached, or comes from interested witnesses.[32] This Court has not yet dealt with the issues arising from these departures from *Wilkerson*.[33] As noted by a leading commentator:

> The language of the opinions from the lower courts has been divided. Some of the cases have followed *Wilkerson* and have said that only the evidence favorable to the party against whom the motion is made may be considered. Others say that the court is to consider all the evidence while still others say that it may look to the favorable evidence and to unfavorable evidence that

---

"It is extremely important to know whether the [Supreme Court's] decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment, and thus are controlling in all jury cases in federal courts. To this question there are powerful arguments both ways, and no very clear answer."

* * *

"A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions, would be of helpful guidance to the lower federal courts." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2526 at 556, 559 (1971).

[31] The Third and Seventh Circuits have also adopted this view. *Inventive Music Ltd.* v. *Cohen*, 617 F.2d 29, 33 (3d Cir. 1980); *Fireman's Fund Ins. Co.* v. *Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976); *Panter* v. *Marshall Field & Co.*, 646 F.2d 271, 281-2 (7th Cir. 1981); *Brunner* v. *Minneapolis St. Paul and Sault Ste. Marie R.Co.*, 240 F.2d 608, 609 (7th Cir. 1957).

[32] *See, e.g.*, *Ralston Purina Co.* v. *Hobson*, 554 F.2d 725, 728-729 (5th Cir. 1977). *See also Matador Drilling Co. Inc.* v. *Post*, 662 F.2d 1190, 1196 (5th Cir. 1981); *Fenner* v. *General Motors*, 657 F.2d 647, 649 (5th Cir. 1981); *Spurlin* v. *General Motors*, 528 F.2d 612, 615 (5th Cir. 1976).

[33] It appears that only the Eighth Circuit continues to apply a rule which is essentially the same as that in *Wilkerson*. *See Simpson* v. *Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967). *See also Russell* v. *United Parcel Serv., Inc.*, 666 F.2d 1188, 1191 n.5 and accompanying text (8th Cir. 1981).

is uncontradicted and unimpeached. 9 *C. Wright & A. Miller, supra,* § 2529 at 572, 573.

The Second Circuit has now [34]adopted the "all the evidence" standard. By considering "all the evidence" and accepting as true testimony by interested, contradicted and impeached witnesses for the verdict-loser, the Second Circuit has weighed the evidence and substituted its own judgment for that of the jury.

For example, the court stated its conclusion that there was insufficient evidence of an agreement to discourage transshipping or discounting because all of *Sony's witnesses* testified that Sony's response to complaints about transshipping was that it could not do anything about the practice. 677 F.2d at 948. [App. C, p.19c]. This testimony was contradicted by the oral testimony of a former high-ranking Sony executive who testified at length regarding Sony's secret anti-transshipping activities. The Court deemed that his testimony could not be credited because it was not "confirmed" by other Sony employees. 677 F.2d at 948, n.4. [App. C, p.6, n.4]. Documentary evidence showing that a Sony official had promised to take action against transshipping was also not credited by the court on the strength of a Sony witness who sought to downplay its significance. *Id.* at 953, n.12 [App. C, p.19, n.12].

Similarly, the Second Circuit held that no inference of conspiracy could be drawn from the sudden reversal of the prior policy of lax enforcement of the advertising program, because a Sony witness testified that his motive in conducting it had been unrelated to transshipping. *Id.* at 949. [App. C, p.20c].

---

[34] The Court noted: "If, however, *after viewing all the evidence* most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below." *Schwimmer* v. *Sony*, 667 F.2d at 952, [App. C, p.15c] *quoting Moore* v. *Lilly*, 662 F.2d 935, 941. Judge Mansfield's use of the term in *Moore* v. *Lilly* was based upon a quote from his own earlier opinion in *Michelman* v. *Clarke-Schwebel*, 534 F.2d 1036, 1042 (2d Cir. 1976). In *Michelman*, too, the standard was employed without any discussion. Inexplicably, Judge Mansfield had, prior to his *Michelman* opinion, explicitly rejected the "all the evidence" standard, holding that "evidence unfavorable to it [the verdict-winner] may be considered only if that evidence stands uncontradicted and unimpeached." *Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 554 (2d. Cir. 1974). It is perhaps significant that in *Michelman* the jury verdict was set aside, while in *Bigelow* it was upheld. *See also Simblest* v. *Maynard*, 427 F.2d 1, 4-5 (2d. Cir. 1970).

In the face of evidence containing taped Sony admissions of a scheme to limit the credit lines of transshippers, and of Supersonic in particular, the court chose to accept the bland assertions of Sony's witnesses that the credit lines of transshippers were not low, and that Supersonic's concededly miniscule credit line was due to its first financial statement, which was "weak". [App. C, p.22c]. The Court did not credit plaintiff's evidence that the "weak" statement was prepared at the outset of plaintiff's business, and that his offer of a strong statement one year later was refused because it was "a bad time to ask". [Tr. 611].

Further examples abound.[35] The district judge heard the testimony of all of the witnesses, and held, in denying Sony's motion for judgment *n.o.v.*, that:

> "The jury was not required to accept any of the testimony of Sony's executives and employees as to their motives or indeed as to any other fact not established by documentary evidence." 1980-81 Trade Cas. ¶ 63,766 at p.78,088. [App. B, p.3b].

The jury's verdict was thus set aside by the Second Circuit on the basis of testimony which the district court had held the jury was not required to believe. The "all the evidence" standard served as a vehicle which enabled the Second Circuit to weigh the evidence and to substitute its own judgment for that of the jury.[36]

---

[35] The court also downplays evidence of anti-competitive action by Sony on the unusual ground that the attempted action did not succeed, or that it was not as vigorously anti-competitive as it could have been. [App. C, p.22c] *See* n.5, *supra*. The situation here is comparable to the problem which this Court addressed in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. at 701, n.10. *See also* the grant of *certiorari* in *Continental Ore*, 368 U.S. 886 (1962) (issue number 6).

[36] The Second Circuit's application of the "all the evidence" standard runs afoul of this Court's express direction in *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1945) and *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930). It also violates this Court's earlier rulings that a jury is not required to accept the testimony of interested witnesses who are impeached by cross-examination. *See Chesapeake and Ohio Railway Co.* v. *Martin*, 283 U.S. 209 (1931); *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899).

This standard has encountered widespread criticism among the legal commentators.[37] They have warned that the "all the evidence" approach when used by a court to set aside a jury verdict "comes dangerously close to weighing the evidence".[38] Permitting the courts to consider contradicted and impeached testimony from the verdict loser (particularly when it issues from interested witnesses) is also inherently destructive of, and contradictory to, the maxim that the evidence must be considered "in the light most favorable" to the verdict winner. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. at 696.[39]

In light of the series of cases, including the instant case, in which the Second Circuit has set aside jury verdicts based upon its own analysis of the evidence,[40] this Court should no longer permit the

---

[37] *C. Wright and A. Miller, supra*, § 2529 at 573; Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 948-953 (1971); Bagalay, *Directed Verdicts and The Right to Trial by Jury in Federal Courts*, 42 Tex. L. Rev. 1053, 1062-63 (1964); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 226 (1961).

[38] *C. Wright and A. Miller, supra*, § 2529 at 571; *Cooper, supra* at 952.

[39] The Second Circuit's articulation of the *j.n.o.v.* standard highlights this. The court now posits the rule as requiring that "all the evidence" be viewed "without weighing the credibility of the evidence." If the court is to consider all the evidence, but may not take into account questions of credibility, the verdict loser's testimony gains equal footing with that of the verdict-winner. The "without weighing the credibility of the evidence" rule operated in the verdict winner's favor so long as only his evidence was considered under the *Wilkerson* rule. The present articulation allows the court to disregard the fact that witnesses whose testimony is inconsistent with the verdict were not credited by the jury. As applied to a hostile witness whose testimony is viewed under the "all the evidence" standard, the "in the light most favorable" requirement becomes meaningless.

[40] The Second Circuit has indicated that it intends to use its extreme treatment of the evidence in this case as a model for future decision-making. In the recent case of *Unijax, Inc.* v. *Champion Int'l, Inc.*, ___F.2d ___, 1982-2 Trade Cas. [CCH] ¶ 64,814 (2d Cir. 1982), the Second Circuit, although writing on an unrelated "tying" issue, declared that *Moore* v. *Lilly* and *Schwimmer* v. *Sony* were "two cases pointing to the correct decision in this case" because in those cases there was also "insufficient evidence" to support plaintiff's claim. Even more unsettling is the *Unijax* court's conclusion that "[t]he Unijax case presents an *a fortiori* situation" to *Moore* and *Schwimmer* because the trial and appellate courts were in agreement on the insufficiency of the evidence. *See also Venture Technology, Inc.* v. *Nat'l Fuel Gas Co.*, ___F.2d ___, No. 81-7069, (2d Cir. July 26, 1982) (raising many of the same issues presented here).

uncertainty surrounding the standards governing *j.n.o.v.* motions. The conflict and disarray among the circuits requires this Court's intervention.[41] In view of the manifest injustice which results from the "all the evidence" rule, this Court should either reaffirm *Wilkerson*[42] or adopt the first Circuit rule,[43] as did Judge Nickerson in the district court below.

III.
CERTIORARI SHOULD BE GRANTED TO ESTABLISH WHEN A COURT OF APPEALS MUST REMAND A NEW TRIAL MOTION TO THE TRIAL COURT

This case presents for resolution the question of whether a verdict-winner who is reversed by the Court of Appeals for insufficiency of the evidence has the right to return to the trial judge on remand to fill the crucial gap in the evidence in a motion for a new trial. This question has emerged as a recurring issue in federal court practice.

Until 1967, it would have been clear under this Court's decisions that remand to the trial court was appropriate where evidentiary exclusions were raised in a new trial motion. This was the rule established in *Cone* v. *West Virginia Pulp & P. Co.*, 330 U.S. 212 (1946). In *Cone*, the Court held that the trial court is uniquely competent to determine the propriety of a new trial, a determination which "calls for the judgment in the first instance

---

[41] *See also* Judge Rives' vigorous dissent to the court's analysis in *Boeing*:

"With deference, I submit that when the majority repudiates for diversity cases the FELA standard and particularly the formula adopted in *Lavender* v. *Kurn*, 1946, 327 U.S. 645, 66 S.Ct. 740, it commits an error of constitutional proportions which will continue to plague this Court and the district courts of this Circuit until the Supreme Court grants certiorari in this or some future case, and corrects the error." *Boeing* v. *Shipman*, 411 F.2d at 377-78.

[42] The departure from *Wilkerson* has been said to create a "hybrid" rule which intermingles the standards governing motions for directed verdicts with those governing motions for a new trial. *See California Computer Products, Inc.* v. *Int'l Bus. Machines*, 613 F.2d 727, 733, n.3 (9th Cir. 1980).

[43] The commentators discussed above unanimously prefer this approach. *See also* J. Moore and J. Lucas, 5A Moore's Federal Practice ¶ 50.02[2] at 50-38 and 50-39 (2d Ed. 1982).

of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." 330 U.S. at 216 [citations omitted].[44]

Subsequent Supreme Court rulings have cast serious doubt on the current viability of this policy. For example, in *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), the Court held that the Courts of Appeal had the power under Rule 50, F.R. Civ.P., to determine new trial motions. This ruling appeared to emasculate the *Cone* doctrine.[45] As a result, the Courts of Appeal have typically determined new trial motions on their own authority rather than remanding for the more appropriate consideration of the trial court.

Later pronouncements by members of this Court strongly suggest, however, that *Cone*'s strong policy requiring remand to the trial court in certain cases should still remain the favored approach taken by appellate courts.[46]

The continued viability of the *Cone* doctrine was most recently indicated by members of this Court in the separate opinion of Justices White and Brennan in *United States* v. *Generes*, 405 U.S. 93 (1972). At least with respect to reversals on evidentiary grounds, the Justices noted:

> "This Court has often repeated that a trial court is the most appropriate tribunal to determine such factual questions, . . . since appellate courts are awkwardly equipped to resolve such issues, particularly in the absence of adversary argument, and since the trial judge

---

[44] Other "practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question," 330 U.S. at 217, include the litigant's belief that "he could fill the crucial gap in the evidence." *Id.*

[45] *See* Louis, Post-Verdict Rulings on the Sufficiency of the Evidence: *Neely* v. *Martin K. Eby Construction Co.* Revisited, 5 Wisc. L. Rev. 503 (1975).

[46] Thus, in *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967), this Court held that on appeal by the respondent who failed in its motion for *j.n.o.v.*, the Court of Appeals, in reversing, should have remanded to the trial judge, who was in the best position to pass upon the question of a new trial "in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers, Fed. Rule Civ. Proc. 50(d)." 387 U.S. at 88.

> has an extensive and intimate knowledge of the evidence and issues 'in a perspective peculiarly available to him alone.' *Cone* v. *West Virginia Pulp and Paper Co.*, *supra* 216, 91 L.Ed. at 852, 67 S. Ct. 752. I would therefore allow the trial court to decide whether a new trial is merited in this case." 405 U.S. at 113 (Opinion of White, J. and Brennan, J.) [citations omitted].

In this case, similarly, critical items of Supersonic's proof were excluded by the trial court, on the grounds that relevance did not outweigh the prejudice to Sony. First, the trial court excluded evidence that Sony furnished the affidavits it received from the transshippers to the District Attorney for criminal action, thereby excluding an important contradiction of Sony's contention that it wished solely to recover the advertising monies. The trial judge also excluded the decision in *Eiberger* v. *Sony Corp. of America*, which evidenced Sony's similar plan and intent to curb transshipping and discounting. Remand is particularly appropriate because the Court of Appeals reversed Supersonic's verdict on the grounds that there was insufficient evidence in its support.[47]

Certiorari is required, therefore, to clarify *Cone* and *Neely* and to delineate for Courts of Appeals those cases where remand to the trial court is required.

---

[47] This is particularly appropriate where, as here, the trial court's evidentiary exclusions were on the grounds that their probative value was outweighed by their prejudice to Sony, under F.R. Evidence 403. *See also* Petition for a Writ of Certiorari in *Moore* v. *Lilly*, *supra*, at 22-28.

CONCLUSION

It is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

I. Scott Bass
Counsel of Record
for Petitioner,
Supersonic Electronics Co.

747 Third Avenue
New York, New York
(212) 751-9494

Of Counsel
PROF. MARK F. POMERANTZ
MILTON A. BASS
JACOB LAUFER
IRVING L. WIESEN
Bass, Ullman & Lustigman

August 16, 1982

APPENDICES

APPENDICES

TABLE OF CONTENTS

PAGE

APPENDIX A—Opinion of the United States District Court for the Eastern District of New York, *Mendel Schwimmer d/b/a/ Supersonic Electronics Co.* v. *Sony Corp. of America*, 1980-81 Trade Cas. [CCH] ¶ 63,580 (E.D.N.Y. 1980)..... 1a

APPENDIX B—Opinion of the United States District Court for the Eastern District of New York, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America* 1980-81 Trade Cas. [CCH] ¶ 63,766 (E.D.N.Y. 1981)..... 1b

APPENDIX C—Opinion of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1981) 1c

APPENDIX D—Order of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, dated June 30, 1982..... 1d

APPENDIX E—Order of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, dated June 30, 1982..... 1e

APPENDIX F—Judgment of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, dated May 3, 1982. ..... 1f

APPENDIX G—Opinion of the United States Court of Appeals for the Seventh Circuit, *Spray-Rite Service Corporation* v. *Monsanto Company*, — F.2d —, 1982-2 Trade Cas. [CCH] ¶ 64,808 (7th Cir. 1982). 1g

THIS PAGE LEFT BLANK INTENTIONALLY

APPENDIX A

Opinion of the United States District Court for the Eastern District of New York, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, 1980-81 Trade Case. [CCH] ¶ 63,580 (E.D.N.Y. 1980)

Memorandum and Order

NICKERSON, D. J.: This is a motion for summary judgment by defendant Sony Corporation of America (Sonam). The underlying complaint alleges that plaintiff Schwimmer, doing business as Supersonics Electronics Co. (Supersonic), was terminated as a distributor for defendant in violation of the anti-trust laws.

[*Transshipping Activities*]

Defendant is the wholly owned United States subsidiary of the Sony Corporation, a Japanese electronics manufacturer. Plaintiff was an authorized dealer for Sony products from December 1975 until April 1977, and purchased its Sony brand products from defendant. The bulk of plaintiff's sales were to Sony dealers in other regions at prices below those offered by defendant or the authorized distributors for those regions. Plaintiff has submitted deposition testimony and other evidence tending to show that defendant did not approve of these transshipping activities. Among the methods which plaintiff alleges that defendant used to discourage this transshipping were provision of an extremely small credit line, discrimination in delivery of merchandise and discriminatory enforcement of the requirements of defendant's cooperative advertising program.

During this period defendant had in effect a cooperative advertising program whereby it gave dealers credits, up to 4% of their

total purchases from defendant, in partial reimbursement for the costs of advertising borne by those dealers. Plaintiff received a copy of the 1976 Manual detailing the procedure for obtaining these credits. Dealers were required to submit signed proof of claims representing their actual advertising expenditures. In or about April 1977 defendant discovered that falsified proof of claims for advertising had been submitted on behalf of plaintiff and other dealers. All were temporarily suspended, required to submit affidavits detailing their alleged fraud, and required to repay the fraudulently obtained credits. Plaintiff refused to do so and was thereafter terminated as a dealer.

In response plaintiff brought the present action charging that defendant and its parent Sony Corporation terminated him not for submitting false proof of claims, but in retaliation for unauthorized transshipping activities, and that this termination was part of a conspiracy in violation of § 1 of the Sherman Act and other anti-trust provisions. Defendant counterclaimed for the $54,133.50 of credits falsely obtained by plaintiff. In defending against the counterclaim, plaintiff contended that the cooperative advertising program was in fact a sham, masking a routine 4% rebate to dealers by defendant. This court held that the cooperative advertising agreement was enforceable and gave partial summary judgment to defendant on its counterclaim. *Schwimmer v. Sony Corp.* [1979-1 TRADE CASES ¶ 62,632], 471 F. Supp. 793 (E.D.N.Y. 1979). The judgment was affirmed on appeal, *Schwimmer v. Sony Corp.* [1980-2 TRADE CASES ¶ 63,434], No. 79-7665 (2d Cir. July 10, 1980).

Defendant now contends that summary judgment should be granted dismissing plaintiff's entire complaint on the grounds that (1) the prior decision on defendant's counterclaim precludes any further litigation as to whether the cooperative advertising plan was a "sham" and thus disposes of plaintiff's claim that he was terminated for an illegal reason, (2) plaintiff failed properly to mitigate some 98% of the damaged claimed, and (3) the complaint does not allege the requisite effect on interbrand competition. These contentions will be dealt with seriatim.

[Collateral Estoppel]

Defendant argues that this court's grant of partial summary judgment on its counterclaim precludes relitigation of the factual question of whether defendant's cooperative advertising plan was discriminately enforced as part of a series of restraints on intra-brand competition. Only those precise issues which were necessarily decided in the prior motion may not be relitigated. *Yates v. United States*, 354 U.S. 298, 336 (1957).

On the prior motion the sole issue was whether the cooperative advertising agreement between plaintiff and defendant was a binding or, as allegedly agreed between the parties, a sham and a nullity. *Schwimmer v. Sony Corp.* [1979-1 TRADE CASES ¶ 62,632], 471 F. Supp. 793 (E. D. N. Y. 1979). The Court of Appeals, in affirming, held only that there was no genuine issue of fact as to whether the parties agreed to treat the written agreement as a sham. *Schwimmer v. Sony Corp.* [1980-2 TRADE CASES ¶ 63,434], No. 79-7665 (2d Cir., July 10, 1980). Thus the issue previously decided by this court and the Court of Appeals is different from the question which plaintiff now wishes to litigate, namely, whether the agreement, though enforceable, was only sporadically and discriminatorily enforced. The Court of Appeals indicated the distinction between these issues, noting that:

> It may be that Sonam did not regularly check or confirm the accuracy of the proof of claim forms submitted by dealers. This does not support a claim of an agreement between Sonam and its dealers to engage in a fraudulent scheme to provide an automatic 4% discount on the bases of falsified advertising claims.

Schwimmer v. Sony Corporation [1980-2 TRADE CASES ¶ 63,434], No. 79-7665 at 4261 (2d Cir., July 10, 1980).

In support of its claim that the issues are identical, defendant argues that much of the same evidence advanced by plaintiff in an attempt to show the agreement a sham will also be offered to show discriminatory enforcement. The fact that the evidence was insufficient to raise an issue of fact as to whether the [agreement]

was unenforceable does not compel the conclusion that that evidence is also insufficient to show discriminatory enforcement.

Finally, defendant points to the recent case of *Eiberger v. Sony Corp.* [1978-2 TRADE CASES ¶ 62,336], 459 F. Supp. 1276, 1989 (S. D. N. Y. 1978), affirmed in part, reversed and remanded in part, [1980-2 TRADE CASES ¶ 63,328], 622 F. 2d 1068 (2d Cir. 1980). There proof that Sonam, the defendant in the present case, exacted warranty fees for extraterritorial sales and terminated a dealer for refusal to pay those fees was held by the District Court to show a violation of § 1 of the Sherman Act and to preclude Sonam's counterclaim for amounts due under that program.

Defendant would have this court read the *Eiberger* case in reverse, and conclude that because in this case an award on the counterclaim was upheld the Court necessarily determined that the cooperative advertising program was not manipulated for anticompetitive purposes. However, the cases are distinguishable. In the *Eiberger* case Sonam made a uniform warranty surcharge on all out-of-territory sales, regardless of whether local warranty service was required. 459 F. Supp. at 1289. Here the parties entered into bilateral agreement providing reimbursement for actual expenses. As noted above, the cooperative advertising agreement is enforceable. But that does not preclude proof that it was enforced in such a manner and under such circumstances as adversely to affect competition. This court and the Court of Appeals made no finding as to whether the agreement was so enforced. The only issue discussed was whether the agreement was a sham.

[*Mitigation of Damages*]

In support of its contention that plaintiff failed properly to mitigate damages, defendant claims that plaintiff would have been immediately reinstated as an authorized dealer if plaintiff had initially cooperated by returning the improperly obtained credits and submitting an affidavit detailing its involvement in the cooperative advertising fraud. While a party generally has a duty to mitigate its damages, this duty extends only to those efforts which

are reasonable under the circumstances. *Christman v. Maristella Compania Naviera*, 349 F. Supp. 845 (S. D. N. Y. 1972), aff'd, 468 F. 2d 620 (2d Cir. 1972). Here it was not unreasonable for plaintiff to refuse to immediately pay a disputed claim of more than $54,000 and to submit a self-incriminatory affidavit, all without any binding assurance that reinstatement would in fact be forthcoming.

[*Intrabrand Competitive Impact*]

The final ground on which defendant seeks summary judgment is that plaintiff's concession on deposition that certain other transshippers were "favored" by defendant renders plaintiff incapable of showing any effect on interbrand competition as a result of defendant's alleged anti-transshipping policies. Defendant further contends that practices which restrict only intrabrand competition without effect in interbrand competition are not illegal under the rule of reason standard for vertical non-price restrictions enunciated in *Continental T.V., Inc. v. GTE Sylvania Inc.* [1977-1 TRADE CASES ¶ 61,488], 433 U.S. 36 (1977). Even assuming that prior admissions will undercut plaintiff's proof of restriction of interbrand competition at trial, the claim would not fail as a matter of law. While it is improper to instruct a jury that it can find liability under § 1 without consideration of the effect of the alleged conspiracy on the market as a whole, *Borger v. Yamaha International Corp.* [1980-2 TRADE CASES ¶ 63,373], No. 79-7447 (2d Cir., May 29, 1980), this does not mean that only conspiracies in restraint of interbrand competition are illegal. Rather, all that is required is that the potential offsetting benefits to interbrand competition must be considered in determining whether a particular restraint on intrabrand competition is prohibited. Where offsetting benefits are not shown, restraints on intrabrand competition alone are sufficient to constitute a violation of § 1 of the Sherman Act. *Eiberger v. Sony Corp.* [1980-2 TRADE CASES ¶ 63,328], 622 F. 2d 1068 (2d Cir. 1980).

The motion for summary judgment dismissing the complaint is denied. So ordered.

THIS PAGE LEFT BLANK INTENTIONALLY

APPENDIX B

Opinion of the United States District Court for the Eastern District of New York, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, 1980-81 Trade Cas. [CCH] ¶ 63,766 (E.D.N.Y. 1981)

Memorandum and Order

NICKERSON, D. J.: In this case the jury, finding that defendant Sony Corporation of America (Sony) had violated Section 1 of the Sherman Act, returned a verdict in favor of Supersonic Electronics Co. (Supersonic) for $675,000 before trebling and exclusive of attorneys fees. Sony has moved, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, for judgment notwithstanding the verdict.

Supersonic contended that it was suspended and thereafter terminated by Sony as an authorized dealer for Sony products because Supersonic was a transshipper and discounter and that this suspension and termination constituted a violation of § 1 of the Sherman Act. The underlying facts are set forth in the prior opinions of this court, [1979-1 TRADE CASES ¶ 62,632], 471 F. Supp. 793 (1979) and Memorandum and Order dated September 25, ¶ 63,580] and in the prior opinion of the Court of Appeals [1980-2 TRADE CASES 1980 [1980-81 TRADE CASES ¶ 63,434], F. 2d (2d Cir. 1980). Acquaintance with those opinions is assumed.

Sony now urges that (1) there was insufficient evidence to support the jury's verdict of an unlawful termination, (2) Supersonic failed to advance any probative evidence of an adverse effect on competition, either interbrand or intrabrand, and (3) the damages awarded were excessive and clearly erroneous.

[Advertising Credits]

Sony claims that its decision no longer to deal with Supersonic was motivated solely by its failure to repay to Sony certain cooperative advertising credits and that none of the events surrounding Supersonic's suspension had anything to do with complaints concerning Supersonic's transshipping and discounting (Sony brief pp. 14-15). At the trial Sony contended that had Supersonic submitted an affidavit explaining its involvement with the advertising agency and paid the moneys due Supersonic would have been reinstated as a dealer, and that only the refusal to submit the affidavit and to pay caused the termination. The suspension of Supersonic and the other eight dealers was, according to Sony, not because they were transshippers and discounters but only because Sony discovered that they had all submitted false advertising claims through a single advertising agent and with the connivance of a Sony employee, Joseph Sadowy. There was evidence from which the jury could have reached these conclusions.

[Transshipping Discounting]

However, the court is of the opinion that there was also adequate proof from which the jury could have decided that the suspensions, including that of Supersonic, had a second, unlawful, motive. There was evidence, viewed in a light most favorable to Supersonic, from which the jury could have concluded the following. Sony received from various of its major customers, characteristically department stores, complaints about some dealers' practice of transshipping and discounting. Some Sony executives, while they knew that an outright elimination of this practice would violate the law and would perhaps be economically unwise, sought to discourage transshipping. Some such tentative steps were taken. In the early part of 1977 Sony, though it had not uniformly enforced its cooperative advertising program in the past, chose to enforce it against nine transshippers whom it suspended for a period of up to two months for making claims for advertising which did not run.

Sony had not previously suspended a customer for making such advertising claims. Nor had it required any customer to submit affidavits concerning its role in the making of such claims. To be sure, as Sony claims, the nine suspensions were made where it appeared that all nine had dealt with a single advertising agency and that Sony employees were involved in the scheme. But the jury was not required to infer that this was the only reason that Sony decided to institute the investigation and the suspensions while not taking similar action in other instances where advertising had not been shown to have run. The jury could also infer from the distaste with which Sony officials viewed transshipping and from their previous actions and their words (in particular those taped by Sadowy) that the suspensions were a signal and a warning to transshippers and a means of putting pressure upon them.

The jury could further have found that the termination of Supersonic followed from the suspension and that it was not unreasonable for plaintiff to refuse to pay the disputed claim of some $54,000 for advertising credits or to submit the affidavit without assurances that Supersonic would then be reinstated.

The jury was not required to accept any of the testimony of Sony's executives and employees as to their motives or indeed as to any other fact not established by documentary evidence.

It is the jury's function to determine the facts, and particularly where the issue is one of motive depending in large part on inference, the court should accept the jury's determination. In this case there was sufficient evidence from which the jury could infer that Sony's suspension and subsequent termination of Supersonic was motivated by the complaints of other customers and Sony's consequent desire to discourage transshipping. The evidence thus supports a determination that Sony's termination was not merely a unilateral refusal to deal. Nor is this a case where the evidence is of complaints without proof of a response by the defendant.

[Impact on Competition]

The argument that Supersonic failed to show any adverse effect on competition is inconsistent with what the Court of Appeals said in *Eiberger v. Sony, Corp.* [1980-2 TRADE CASES

¶ 63,328], 622 F. 2d 1068, 1081 (2d Cir. 1980). There was evidence that Supersonic sold at prices lower than such Sony retailers as department stores and national accounts, that Supersonic's customers could resell at lower prices to consumers because most of the time Supersonic's prices were lower than those of other transshippers, and that Supersonic's customers paid more for Sony products after Supersonic was terminated.

[Damages]

Sony's contentions that the damage award was excessive is based largely on an attack on the testimony of Supersonic's expert as "too speculative" (Sony brief p. 52). In substance, Sony contends first that the projected growth rate of Supersonic's sales was not grounded on a reasonable base period. That question is essentially a factual one and was before the jury. The court cannot say that the expert's base figures were unreasonable, particularly in the light of inflation and the growth rate assumed by the expert. Sony's other criticisms of the methods and conclusions of the expert also present matters which were for the jury.

[Damage Period]

As a final part of its general attack on the amount of damages awarded, Sony points out that the complaint in this action was filed after plaintiff was suspended as a Sony dealer but that permanent termination only occurred thereafter, and concludes that plaintiff's damages should be limited to those accruing prior to the filing of the complaint. The rule is clear that an antitrust plaintiff may recover post-filing damages and lost future profits which result from defendant's acts occurring prior to the filing of the complaint. Absent an amended complaint, however, damages are not recoverable for damages resulting from acts which occur after the suit commences. *Zenith Radio Corp. v. Hazeltine Research, Inc.* [1971 TRADE CASES ¶ 73,484], 401 U.S. 321, 339 (1971); *Lawlor v. Loewe*, 235 U.S. 522, 536 (1915). Thus for purposes of determining whether the plaintiff's proof of post-filing damages is le-

gally sufficient to support the jury's award, it must be determined which act or acts of the defendant gave rise to those damages and when such act or acts occurred.

Sony points out that the acts of which Supersonic complains, its suspension and termination as a Sony dealer, are in the nature of a refusal to deal. It cites some authority holding in such cases, at least absent a permanent break in business relations, that each day's refusal to deal constitutes a separate "act," that it is impossible to foresee how long the refusal to deal will continue and thus that the award of post-filing damages is both improper and unduly speculative. *Flinkote Co. v. Lysfjord* [1957 TRADE CASES ¶ 68,674], 246 F. 2d 368 (9th Cir. 1957); *Connecticut Importing Co. v. Frankfort Distilleries* [1932-1939 TRADE CASES ¶ 55,200], 101 F. 2d 79, 81 (2d Cir. 1939). Sony then argues that the mere suspension of Supersonic was not a permanent break in relations which would enable plaintiff to recover post-filing damages and that permanent termination was a separate "act" occurring after the filing of the complaint which thus cannot itself support any award of damages. Sony thus concludes that the period for which damages could be recovered terminated with the filing of the complaint, that plaintiff introduced no evidence of damages accruing during that period or from "acts" committed during that period, and that consequently no damages should be awarded.

However, this tenuous chain of reasoning depends upon the factual assertion that business relations between the parties were not permanently severed by the original suspension of Supersonic as a Sony dealer. Again in this context Sony blandly asserts that it would have been willing to reinstate plaintiff after some interval if only plaintiff had submitted to its demands. However, Sony's willingness to reinstate Supersonic and the reasonableness of Supersonic's unwillingness to accede to those demands were issues that were argued to the jury and resolved against defendant. "[Plaintiff] was not bound to make repeated requests [for goods from its supplier] or to exhaust every possible avenue to avoid the effects of defendant's illegal activity but could maintain an action for an injury which flows naturally and expectedly from such injury." *Fontana Aviation Inc. v. Beech Aircraft Corp.* [1970 TRADE CASES ¶ 73,330], 432 F. 2d 1080, 1087 (7th Cir. 1970).

Thus for purposes of the *Lawlor* rule restricting post-filing damages to those resulting from acts committed prior to the complaint, the suspension of Supersonic as a dealer, coupled with the conditions which Sony placed on possible reinstatement, constitutes a sufficiently permanent break in relations to be the "act" from which all of Supersonic's subsequent damages flowed.

Moreover, defendant failed to raise this issue at trial. On the contrary, it vigorously contested plaintiff's evidence and presented its own evidence on damages for the period between the filing of the complaint and trial. Even if Sony's subsequent decision to make permanent a suspension already in force constitutes an "act" distinguishable from that continuing suspension, Sony has waived any objection on this point.

> It is true that the general rule in private antitrust actions is that damages arising from acts committed after the filing of the complaint may not be recovered except in a separate suit. . . . However, this rule does not prevent recovery where plaintiff is allowed to supplement his complaint to include subsequent acts and damages, at least to time of trial.

Shane v. Madison Square Garden Corp., 491 F. 2d 397, 401 (2d Cir. 1974). While Supersonic did not formally move to amend its complaint, it is clear that the issue of damages during the period between the complaint and trial was actually tried. Thus the complaint can be deemed amended by implied consent if any such amendment would be required. Federal Rule of Civil Procedure 15(b). See also *Washington State Bowling Proprietor's Ass'n v. Pacific Lanes, Inc.* [1966 TRADE CASES ¶ 71,685], 356 F. 2d 371 (9th Cir. 1966).

Defendant's motion for judgment notwithstanding the verdict is denied. So ordered.

APPENDIX C

Opinion of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1981)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75—August Term, 1981

(Argued September 21, 1981 Decided May 3, 1982)

Docket No. 81-7135

MENDEL SCHWIMMER d/b/a SUPERSONIC ELECTRONICS CO.,

Plaintiff-Appellee,

—v.—

SONY CORPORATION OF AMERICA,

Defendant-Appellant.

Before:

NEWMAN and KEARSE, *Circuit Judges,*
and DALY, *District Judge.**

Appeal from a judgment entered in the United States District Court for the Eastern District of New York,

---

* The Honorable T.F. Gilroy Daly, of the United States District Court for the District of Connecticut, sitting by designation.

Eugene H. Nickerson, *Judge*, upon a jury verdict in favor of the plaintiff in action brought under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

Reversed.

I. SCOTT BASS, New York, New York (Steven R. Trost, Lawrence H. Roth, Irving L. Wiesen, Bass, Ullman & Lustigman, New York, New York, on the brief), *for Plaintiff-Appellee.*

JOSHUA GREENBERG, New York, New York (Randolph S. Sherman, Ira S. Sacks, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, Asa D. Sokolow, Douglas N. Gordon, Brian G. Lustbader, Rosenman Colin Freund Lewis & Cohen, New York, New York, on the brief), *for Defendant-Appellant.*

KEARSE, *Circuit Judge*:

Defendant Sony Corporation of America ("Sonam") appeals from a judgment of the United States District Court for the Eastern District of New York, Eugene H. Nickerson, *Judge*, entered upon a jury verdict in favor of plaintiff Mendel Schwimmer ("Schwimmer") d/b/a Supersonic Electronics Co. ("Supersonic") in the amount of $675,000 before trebling and exclusive of attorney's fees, for Sonam's termination of Supersonic as a dealer in Sony products, pursuant to a conspiracy between Sonam

and certain of its other dealers and distributors in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). On appeal Sonam's principal argument is that the district court erred in denying Sonam's motion pursuant to Fed. R. Civ. P. 50(b) for judgment notwithstanding the verdict. We agree with Sonam that there was insufficient evidence to support an inference that the alleged conspiracy existed, and we therefore reverse the judgment.

I. FACTS

From January 1976 until April 1977, Supersonic was a dealer in Sony electronic consumer products such as radios, tape recorders, and color television sets. The gist of Supersonic's claim is that Sonam, pursuant to a general conspiracy between it and its customers to restrain trade in Sony consumer products, terminated Supersonic's dealership because Supersonic sold such products to retailers in geographical areas other than the New York metropolitan area where Supersonic was located (a practice known as "transshipping") and sold at prices lower than those offered by other Sony customers. Viewed in the light most favorable to Supersonic, the party that prevailed at trial, *see* Part II, *infra*, the evidence revealed the following events leading to Supersonic's termination.

A. *Sonam's Distribution System*

Sonam is the wholly-owned United States sales subsidiary of Sony Corporation, a Japanese manufacturer of electronic products. At the times pertinent to this case, Sonam marketed its consumer products in essentially two ways. In most areas of the United States, Sonam sold to independent distributors, who sold at wholesale rates to

retail dealers, who sold to consumers. In the larger metropolitan areas, including the New York City area, Sonam sold its products directly to the dealers. Sonam also sold directly to "national accounts," which were dealers with retail operations in a number of different geographical areas; these included certain department stores and certain dealers allied as joint buying groups.

Sonam did not grant exclusive distributorships or dealerships within given geographical areas. Rather it assigned each distributor a primary area of responsibility, although distributors remained free to operate outside of their primary areas. During the pertinent period, Sonam placed no restrictions on the rights of its dealers to sell in any area.[1] Prior to April 1975, Sonam had retail price lists that it provided to dealers, and it took advantage of "Fair Trade" laws[2] to require dealers to sell at the prescribed prices. In April 1975, with the abolition of Fair Trade laws in the offing, *see* note 2, *supra,* Sonam established instead "suggested" retail price lists and ceased to insist on adherence to the listed retail prices.

---

1 In January 1978 Sonam adopted new dealership agreements that required each dealer to sell only to consumers and to sell only from the location at which it was operating. In substance the new agreements prohibited transshipping.

2 Fair Trade laws, such as N.Y. Gen. Bus. Law § 369-a (McKinney 1968), allowed manufacturers of brand named products to require their dealers and distributors to agree to resell the products at prices set by the manufacturer. Until 1975, a proviso of § 1 of the Sherman Act exempted such Fair Trade agreements from that section's general prohibition of contracts "in restraint of trade" if the resale of the product was to take place in a state with a Fair Trade law and the contract conformed to that Fair Trade law. Congress repealed this proviso in late 1975. Consumer Goods Pricing Act of 1975, Pub. Law 94-145, 89 Stat. 801. Many Fair Trade states, including New York, repealed their Fair Trade laws just before Congress deleted the § 1 proviso. *See* Act of May 5, 1975, 1975 N.Y. Laws ch. 65 (repeal effective ninety days after date of passage).

The prices at which Sonam sold its products to dealers were subject to a number of possible discounts. There were various discounts related to the timing of the dealer's payments, and there were volume discounts in varying percentages for bulk purchases in individual orders and for cumulative purchases through the course of a year.[3] When totaled, those discounts could amount to about 15 percent of Sonam's stated prices to dealers. The availability of such discounts made it possible for a high-volume dealer who bought directly from Sonam both to charge retail prices substantially below the prices charged by dealers who adhered to Sonam's suggested list prices, and to resell to other retail dealers (*i.e.*, to transship) at lower prices than those normally charged to retailers by Sonam or its distributors. The strong consumer demand for Sony products and the elimination of Sonam's Fair Trade practices in the spring of 1975 led a number of Sony dealers to engage in transshipping and price cutting, and Sonam began to receive complaints of such activities from other distributors and retailers.

All Sonam witnesses who had received such complaints testified that Sonam's response to the complaints had been that Sonam could not do anything to curtail the price cutting or the transshipping. Various witnesses adverted to customer complaints only in general terms; the most detailed testimony came from former Sonam executive Joseph Sadowy, who, in the spring of 1977, had been discharged by Sonam for his role in the events that immediately preceded the termination of Supersonic's dealership. Sadowy, who had been general manager of Sonam's eastern region in the mid-1970's, described

---

3 The formation of joint buying groups enabled dealers to take greater advantage of benefits accorded to high-volume purchasers.

Sonam conversations during that period with officials of Macy's, Abraham & Straus ("A&S"), and Gimbels. With respect to a discussion with a Macy's vice president, Sadowy testified:

> The one conversation that I remember is he was complaining about the transshipping. He was complaining about the price cutting. And the end result of this discussion at that time, Macy's decided to bring out their own brand. And they called it Super Macy. That was as a result of this price cutting that was going on in the market. So Macy's said—and I believe Bamberger's sells the same line. That was basically the whole conversation.

(Tr. 161.) As to A&S, Sadowy testified that its vice president Kagan "was very upset because of the price cutting. And he wanted to make his full markup. And just that kind of conversation." (Tr. 162.) According to Sadowy, Sonam vice president Raymond Steiner "tried to assure [Kagan] we were working on programs to help him out at that meeting and that there were going to be changes in our program to help reduce the transshipping and price cutting. We were going to have some stability." (*Id.*)[4] When Sadowy and two other Sonam executives met again with Kagan and the president of A&S, and Kagan reiterated his dissatisfaction, the Sonam employees did

---

[4] This is the only testimony indicating that a Sonam executive responded, even in the general way described, that Sonam could or would take any action to reduce transshipping or price cutting. *But see* note 12 *infra*. Sadowy's version of Steiner's statement was not confirmed by any other participant in the conversation. (Steiner died prior to the taking of any depositions in this action.) Sadowy's description of further conversations with A&S, *see* text following this note, and A&S's actions thereafter negative any inference that the general "assur[ances]" attributed to Steiner signified, or led to, any agreement between Sonam and A&S on the elimination of transshipping.

not respond. Sadowy stated that there were no further meetings with A&S because A&S "stopped buying Sony's products at that point." (Tr. 165.) Sadowy also testified that he had discussed transshipping with a representative of Gimbels along the same lines. According to Harvey Schein, Sonam's president from 1972 until the summer of 1977, after Sonam told Gimbels that there was nothing Sonam could do about the complaints, Gimbels too ceased selling Sony products.

Supersonic began selling Sony products in January 1976, pursuant to a dealership agreement signed in December 1975. Supersonic, which was located in New York, quickly began selling large volumes of Sony products at discounted prices to other retailers in Florida, Georgia, Texas, and Philadelphia. In its first year under the contract Supersonic's purchases from Sonam amounted to more than $3 million. While Sonam customers complained about transshipping generally, none of their complaints mentioned Supersonic specifically.[5]

B. *Sonam's Cooperative Advertising Program and the "Computer Cast" Frauds*

In order to encourage its dealers to run local advertising of Sony products, Sonam maintained a "cooperative advertising" program. Under this program Sonam would in effect pay the bulk of the cost of the local advertising by granting to the advertising dealer a credit for 75% of the cost, up to a maximum of 4% of the dealer's purchases from Sonam for the year.

---

5 Supersonic disclaims any contention that Sonam and its customers conspired to terminate Supersonic: "This case did not involve a conspiracy to terminate Supersonic; the termination of Supersonic was simply one act by [Sonam] in furtherance of the general conspiracy." (Supersonic Brief at 1.)

In April 1977, Sonam began an investigation into the cooperative advertising claims of several New York area Sony dealers who were known to be transshippers. The investigation was ordered by Sonam president Schein on the premise that a dealer who (a) shipped out of his own area, and (b) sold chiefly to other retailers, had no real need to run local advertising in consumer-oriented media. Schein testified as follows:

> I seem to recall that there was a meeting at which we were talking about coop[erative] advertising and that we were spending literally tens of millions of dollars a year on coop[erative] advertising and there may have arisen the subject of transshippers and the idea that a transshipper buys a product in one place and sells it in another place and that the question came up that if he did not sell his product where he purchased it then how could he be taking advertising for the product where he purchased it and there I may have said . . . "If that's the case, send in our auditors to find out whether these people were indeed advertising and if they were not advertising and they were therefore charging us for something which never existed, then we should seek to get our money back because otherwise we're being cheated, being defrauded."

(Tr. 890.) Though the initial focus had been on transshippers, as those least in need of local advertising, Schein testified that his plan had been, if the initial audits confirmed his suspicions, to extend the audits "through to the entire roster." (Tr. 898.) And in fact the audit was eventually extended to all dealers in the eastern region and to all national accounts.

The audit, which consisted of, *inter alia*, communication by Sonam with representatives of the media that were supposed to have run the advertising, disclosed that a number of Sony dealers had indeed submitted claims for advertising that had never been run. In particular, Sonam quickly discovered that nine dealers, at least seven of which were transshippers,[6] had submitted, through a company called Computer Cast, false claims to Sonam totaling nearly $500,000 for commercials supposedly carried on two New York radio stations. The audit revealed that the commercials had never been aired and that the radio station invoices submitted to Sonam by Computer Cast in support of the claims had been forged. One of the "Computer Cast Nine" was Supersonic, which had been granted credits totaling more than $54,000.[7] All of the credits to these nine dealers had been approved by Sadowy. Most of the nine dealers had retained Computer Cast at the suggestion or insistence of Sadowy or his assistant Janet Melchiorre.

The audit had been commenced while Sadowy was on a week-long business trip to Dallas, and, with respect to the claims submitted through Computer Cast, Sonam had

---

6 At trial the parties stipulated that "seven of [the nine Computer Cast] dealers were transshippers of Sony brand products." Sadowy testified that all nine were transshippers, seven of them large transshippers and two smaller dealers that did some transshipping.

7 The nine dealers had been credited with the following amounts:

Alkit Camera Shops	$ 3,172.50
Bryce Audio	223,444.37
Grand Central Radio	8,698.33
Hampton Sales	52,887.24
Pioneer Sales and Electronics	68,961.88
Supersonic	54,133.50
Trader Horn	39,974.25
Ultralinear Sound (Crazy Eddy)	13,603.50
Vendome Trading	15,227.50

sent each dealer's claim documentation to the radio station in question, requesting verification that the commercials had been aired. When Sadowy learned of Sonam's inquiries, he arranged, from Dallas, to have Melchiorre send letters in his name to the radio stations, asking them to return the documentation immediately ("Thank you for returning the papers that were sent to you in error. These documents have no bearing or relationship to your station."). Shortly after Sadowy's return to New York he was questioned by Sonam attorneys, and he and Melchiorre were suspended from work and were eventually fired.

On April 26, 1977, a few days after Sadowy's suspension, Sonam sent a letter to each of the nine dealers that had submitted claims through Computer Cast, informing each that Sonam had discovered a specified total of false claims submitted by that dealer. In each letter Sonam demanded that repayment be made by 5 p.m. on the following day, and that each dealer meet with Sonam within three days to "explain how such improper claims for payment could have been submitted by you." Sonam also stated that after hearing the explanation it would decide what action to take in addition to demanding reimbursement.

Each dealer met with Sonam. Most, if not all, said they had not known their claims to be false. Sonam advised each dealer that it was suspending sales to the dealer pending investigations. Thereafter Sonam informed each dealer by letter that Sonam would permit the resumption of purchases if the dealer repaid the amount wrongly credited to it and furnished Sonam's counsel with an affidavit describing the dealer's involvement with Computer Cast, and if Sonam's counsel concluded that the

dealer had not attempted to defraud the company. Sonam explained the purpose of its demand as follows:

> Sony has adopted the above procedure applicable to all dealers who, to its knowledge, received such improper co-op credits, as the most equitable way to fulfill its obligation to itself as well as its other customers not to sell to those who have attempted to defraud Sony and thereby obtain an unfair advantage over its other customers.

Eight of the dealers agreed to Sonam's terms in May or early June 1977. By mid-June seven of these eight dealers had provided the requested affidavits and either made repayments or set up a schedule for repayment. Sonam shortly resumed selling to these seven dealers.

The only dealer that refused from the outset to make repayment or to give an affidavit was Supersonic. Supersonic never changed its position and in the absence of repayment and an affidavit, Sonam did not reinstate it. Supersonic remained suspended until its dealership agreement expired at the end of 1977.

C. *The Present Lawsuit*

On June 17, 1977, after the reinstatement of the seven dealers who had given affidavits and agreed to make repayments, Schwimmer commenced the present treble damage action, alleging principally that Sonam's termination of the Supersonic dealership was the result of a conspiracy among Sonam and its customers to discourage transshipping, in violation of § 1 of the Sherman Act.[4] In

---

[4] Schwimmer asserted other claims that were dismissed on summary judgment. These included principally his claim against Sony Corporation under §§ 2(a), (d), and (e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (d), and (e) (1976), *see Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2d Cir. 1980) (affirming summary judgment),

addition to the evidence described above, Schwimmer introduced evidence, discussed in part II, *infra*, of Sonam's treatment of customers other than Supersonic and the Computer Cast Nine.

At the close of the evidence the jury was asked to return a special verdict, answering six questions. The first four, which related to the issue of Sonam's liability, were as follows:

1. In the years of 1976 and 1977, did defendant engage in a combination or conspiracy with certain of its dealers and distributors to discourage transshipping and discounting?
2. If the answer to question 1 is yes, did this combination or conspiracy restrain interstate trade or commerce?
3. If the answer to questions 1 and 2 are yes, was this restraint unreasonable?
4. If the answers to questions 1, 2 and 3 are yes, was plaintiff's dealership terminated because of this conspiracy?

The jury answered each question in the affirmative, and went on to find that Schwimmer had been proximately damaged in his business or property in the amount of $675,000.

Sonam moved pursuant to Fed. R. Civ. P. 50(b) for judgment notwithstanding the verdict ("n.o.v.")[9] on the

---

and claims that Sonam had engaged in unfair competition and unfair business practices in violation of New York law.

Sonam counterclaimed against Schwimmer for his refusal to pay for goods purchased, and was granted summary judgment for $54,133.50, the amount of false advertising credits that Supersonic had refused to repay. This judgment was affirmed on appeal. *Id.*

9 At the close of the evidence Sonam had moved unsuccessfully for a directed verdict.

ground, *inter alia*, that the evidence was insufficient to support a verdict that Supersonic had been terminated pursuant to an unlawful conspiracy. In an opinion reported at 1980-81 Trade Cas. ¶ 63,766 (CCH) (E.D.N.Y. 1981), the district court denied the motion. Focusing principally on the question of causation, rather than on whether a conspiracy had been proven, the court stated that although there was evidence from which the jury could have concluded that Supersonic had been suspended solely because of its failure to repay the Computer Cast credits rather than for any reason relating to Supersonic's transshipments,

> there was also adequate proof from which the jury could have decided that the suspensions, including that of Supersonic, had a second, unlawful, motive. There was evidence, viewed in a light most favorable to Supersonic, from which the jury could have concluded the following. [Sonam] received from various of its major customers, characteristically department stores, complaints about some dealers' practice of transshipping and discounting. Some [Sonam] executives, while they knew that an outright elimination of this practice would violate the law and would perhaps be economically unwise, sought to discourage transshipping. Some such tentative steps were taken. In the early part of 1977 [Sonam], though it had not uniformly enforced its cooperative advertising program in the past, chose to enforce it against nine transshippers whom it suspended for a period of up to two months for making claims for advertising which did not run.
>
> [Sonam] had not previously suspended a customer for making such advertising claims. Nor had it re-

> quired any customer to submit affidavits concerning its role in the making of such claims. To be sure, as [Sonam] claims, the nine suspensions were made where it appeared that all nine had dealt with a single advertising agency and that [Sonam] employees were involved in the scheme. But the jury was not required to infer that this was the only reason that [Sonam] decided to institute the investigation and the suspensions while not taking similar action in other instances where advertising had not been shown to have run. The jury could also infer from the distaste with which [Sonam] officials viewed transshipping and from their previous actions and their words (in particular those taped by Sadowy) that the suspensions were a signal and a warning to transshippers and a means of putting pressure upon them.

Id. at 78,088. The court entered judgment in favor of Schwimmer in the sum of $2,025,000, after trebling, with the amount of attorney's fees to be set at a later time. This appeal followed.

II. DISCUSSION

The function of an appellate court reviewing the denial of a judgment n.o.v. is essentially the same as the function of the trial court in ruling on the judgment n.o.v. motion. Both courts must determine whether the evidence, viewed in the light most favorable to the party that secured the verdict, was sufficient to allow a reasonable juror to arrive at the verdict rendered. *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981); 5A Moore's Federal Practice ¶ 50.07[2] (2d ed. 1981). As we stated recently in the *Eli Lilly* case,

we must determine, without weighing the credibility of the evidence but viewing it most favorably to the plaintiff, whether "there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice Par. 50.07[2] (2d ed. 1980); see also *Beech Cinema v. Twentieth Century-Fox Film*, 622 F.2d 1106, 1107-08 (2d Cir. 1980). To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury.

> "If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitled it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042, (2d Cir.), *cert. denied*, 429 U.S. 885 (1976).

662 F.2d at 940-41. Our review of the record in the present case convinces us that, even after drawing all permissible inferences in favor of Schwimmer, there was insufficient evidence from which the jury could rationally conclude that Sonam had entered into an unlawful conspiracy.[10]

---

[10] Sonam also argues that, assuming the existence of a conspiracy to eliminate transslipping, Supersonic failed to prove that his termination was caused by that conspiracy; and it challenges certain evidentiary rulings and instructions of the trial court. In light of our conclusion that there was not sufficient evidence to prove the existence of a conspiracy, we need not reach Sonam's other contentions.

The starting point for proof of a violation of § 1 of the Sherman Act is evidence that the defendant acted as part of a "contract, combination . . . , or conspiracy."[11] Other elements aside, it is clear that the essence of a § 1 violation is a combination or agreement between two or more persons. Proof of joint or concerted action is required; proof of unilateral action does not suffice. As we stated in *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975), § 1 of the Sherman Act

> is directed only at joint action. . . . It does not prohibit independent business actions and decisions. A person still has the right to refuse to do business with another, provided he acts independently and not pursuant to an unlawful understanding, tacit or expressed. Fundamental then to any § 1 claim is the finding of an agreement, express or otherwise, between two or more persons.

Id. at 108-09. In *H.L. Moore Drug Exchange v. Eli Lilly & Co., supra,* in which we reversed the district court's denial of judgment n.o.v. where the plaintiff had obtained a favorable verdict on its claim that Lilly's termination of plaintiff as a wholesaler violated § 1, we set forth in some detail the requirements for proving a conspiracy within the meaning of § 1:

> A unilateral refusal by Lilly to deal with a wholesaler, absent proof that it was pursuant to a conspiracy, does not violate § 1 of the Sherman Act.

---

[11] Section 1 of the Sherman Act, 15 U.S.C. § 1, reads in relevant part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

United States v. Colgate & Co., 250 U.S. 300 (1919); *Oreck v. Whirlpool Corp.*, 639 F.2d 75 (2d cir. 1980). Moore could prevail only if it proved that its termination stemmed from "a contract, combination or conspiracy" between Lilly and certain of its wholesalers. *Oreck, supra,* at 79.

Conspiracies, of course, are rarely evidenced by explicit agreements, but must almost always be proven by "inferences that may be fairly drawn from the behavior of the alleged conspirators." *Michelman v. Clark-Schwebel Fiber Glass Corp., supra,* 534 F.2d at 1043. At a minimum, however, "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946).

Although the evidence warranting an inference of concerted action will vary from case to case, courts have laid down fairly specific guidelines about what will be considered insufficient as a matter of law to warrant the inference of a conspiracy. Thus "[a] mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." *Oreck, supra,* 639 F.2d at 79. Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, support a finding of conspiracy with them. *Id.* at 80; *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 395 (2d Cir.

1980); *Modern Home Institute v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, [451 U.S. 911] Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them *Modern Home Institute v. Hartford, supra; Edward J. Sweeney & Sons v. Texaco, supra; A. G. Rogers Co. v. Merck & Co.*, 498 F. Supp. 5 (E.D.Tenn.1980).

662 F.2d at 941.

In the present case, even recognizing that the proof as to a conspiracy will usually be circumstantial, we find no evidence in the record from which the jury could reasonably have inferred that in 1976 or 1977 Sonam and any of its customers entered into an agreement, either express or tacit, to discourage transshipping of Sony consumer products. There was ample proof that Sonam's dealers complained about transshipping, but such complaints do not suffice to support an inference of agreement. *H.L Moore Drug Exchange v. Eli Lilly & Co., supra.* There was also evidence that some, although not all, Sonam executives disliked transshipping and discussed ways to reduce it; but collaborative action between a corporation and its employees, or among employees within a corporation, is not regarded as joint action within the meaning of § 1. *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir.), *cert. denied*, 102 S. Ct. 390 (1981).

The facts of record as to what Sonam said to complaining customers, what complaining customers did following

the Sonam responses, and what Sonam did with respect to transshipping dealers, are inconsistent with any inference that there was an agreement to discourage transshipping. As to individual complaining customers, the evidence was that Sonam responded that it could do nothing to restrict transhipping.[12] *See* note 4, *supra*, and surrounding text. The subsequent actions of several of the complainers provide strong confirmation that this had been Sonam's response. In the wake of Sonam's statements that it could not take action with respect to price cutting or transshipping, Gimbels ceased to buy Sony products. A&S did

---

12 Supersonic also points to a 1976 letter that it contends demonstrates that Sonam "actively followed through on customer complaints to ascertain the source of, and report back to the customer about," transshipping. (Supersonic Brief at 9.) The letter, from Sonam national sales manager Vernon Brisson, was sent to a Texas distributor who had complained of sales in Houston by a New York shipper and a Los Angeles catalog company, and stated as follows:

> This is to acknowledge your phone call and to let you know that we will try to help you in every possible way with the marketing problems you are experiencing.
>
> If you have a copy of the Olympic Sales Catalog, would you please forward it to my attention - I would like to review this catalog and discuss it with our people in Los Angeles.
>
> As for the account in Yonders [*sic*], N.Y., who is supposedly shipping to the Texas area, I have been unable to gather any information on this account. To the best of my knowledge, we do not sell this particular account.
>
> We shall continue to exert all effort to aid you to improve your market conditions.

So far as appears from the record, Brisson merely asked other Sonam employees whether Sonam was selling to the two companies mentioned; he determined that Sonam did not sell to the New York shipper and did sell to the Los Angeles catalog company; he did not inquire whether there were other Sonam customers shipping into the Houston area; and he made no further inquiries as to the two in question, took no action with respect to either, and gave the matter no further thought. We are unable to regard the Brisson letter, either standing on its own or in the context of the record as a whole, as a sufficient basis for inferring the existence of the general conspiracy to discourage transshipping as alleged by Supersonic.

likewise. And Macy's decided to bring out its own brand. Thus, the actions of the three Sony customers whose conversations with Sonam were described in greatest detail at trial indicate that no agreement to discourage transshipping was reached.

Sonam's treatment of dealers who transshipped similarly is inconsistent with the notion that Sonam had agreed to discourage transshipping. With the exception of Supersonic and the other dealer who eventually refused to repay the advertising credits gained through Computer Cast, there was no evidence that Sonam had ever terminated the dealership of any transshipper of consumer products.[13] As to the Computer Cast affair, there was no evidence that the suggestion for an audit of cooperative advertising claims came from dealers who complained about transshipping. The evidence was that Schein ordered the audit to determine whether the company was being bilked by dealers who did not need to advertise. And, indeed, the net cast by the audit caught faulty claims by nontransshippers as well as transshippers. Sonam's actions with respect to the Computer Cast Nine in particular seriously undercut the premise that Sonam had agreed with its complaining dealers to attempt to discourage transshipping. Of the Computer Cast Nine, seven were companies that did large amounts of transshipping. All nine companies were given the opportunity to remain Sony dealers, seven of them took advantage of

---

13 In *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980), which involved Sony business products rather than the consumer products at issue here, Sonam had unlawfully terminated its contract with a business products dealer. The termination in *Eiberger* had been part of Sonam's implementation and enforcement of a warranty fee system embodied in Sonam's 1975 contracts with all its business product dealers. There was no question that there existed between Sonam and those dealers pertinent contracts within the meaning of § 1.

that opportunity, and Sonam immediately resumed selling to those seven. There was no evidence that Sonam conditioned its treatment of these dealers on a reduction of their transshipping activities, or that it even mentioned transshipping. An official of Hampton Sales, a major transshipper, testified that the subject of transshipping was never raised.

Notwithstanding these facts, Supersonic contends that an agreement between Sonam and its customers to discourage transshipping can be inferred from three other circumstances: (1) that Sonam restricted credit lines in order to reduce transshipping, (2) that Sonam provided certain products only to nontransshippers, and (3) that other Sonam customers who submitted faulty advertising claims received better treatment that Supersonic. A review of the record reveals that some of these propositions fail for lack of factual predicate and that none of the circumstances proven by Supersonic showed the existence of the alleged general conspiracy to discourage transshipping.

Supersonic's argument that Sonam sought to control transshipping by restricting transshippers' credit lines was based on the fact that Supersonic was allowed a credit line of only $8,000, and on a taped conversation between Sadowy and Sonam's regional credit manager Thomas Lisanti in which Lisanti stated that he thought Sonam management wanted to eliminate transshipping, although it did not want to give up the sales volume, and that he had told management that he was slowing down the transshipping by controlling the credit lines. The record, however, belies the inferences suggested by Supersonic. First, although Supersonic's own credit line of $8,000 was small in comparison to its more than $3,000,000 of purchases, the evidence was that the only financial state-

ment Supersonic ever furnished to Sonam showed that Supersonic's net worth was only $20,000. As Schwimmer himself testified, "[i]t was a weak financial statement." (Tr. 615.) Further, the record shows that the credit lines of the other major transshippers were not, in fact, kept low. For example, of Sonam's ten eastern region dealers with the highest volumes of purchases in 1976, seven, including Supersonic, were transshippers, and an eighth was a buying group that included transshippers. The six transshippers other than Supersonic, and the buying group that included transshippers, all had credit lines between $200,000 and $300,000. In fact, at $300,000, Hampton Sales, a major transshipper, had the second highest credit line of all major eastern region dealers as of January 31, 1976; and as of January 31, 1977, Hampton's credit line was $400,000, by far the highest of all such dealers.

Supersonic's contention that Sonam made certain products available only to nontransshipping customers is similarly flawed. Supersonic places principal reliance on the fact that in late 1976 Sonam introduced two slightly modified models of color television sets, containing several features (such as tone control, a vinyl rosewood veneer on wood cabinet, and a 5-inch speaker) not available on standard Sony sets. These two models were offered only to about a dozen department stores or buying groups for the first ninety days following their introduction, and were intended to "give each region an opportunity to present longer mark-up color TV models to profit-oriented Sony dealers." The impetus for Sonam's introduction of the two "sheltered models" was requests from these customers for products that they could sell without erosion of their profit margins. As it happened, these customers did not sell sufficient numbers

of the sheltered models, and the two models were soon made available to all Sonam customers. Even the initial actions by Sonam, however, while obviously intended to bolster the ability of certain customers to sell the two models without impairment of their desired profits margins, do not support an inference that Sonam had agreed to curtail the activities of transshippers. First, even during the limited time that the sheltered models were sheltered, the flow of other Sony models to all transshippers appears to have continued unabated. Second, there is no evidence that any model of a Sony product was denied only to transshippers. And finally, among the dozen "favored" customers that received the sheltered models were at least two buying groups—Nationwide and National Appliance & Television Merchants ("NATM")—that included transshippers. Thus, the sheltered models were initially unavailable to most, but not all, nontransshippers, and to most, but not all, transshippers.

Finally, Supersonic sought to show that Sonam discriminated against the Computer Cast Nine, chiefly by requiring them, as a condition to their reinstatement, to provide affidavits that could be used against them, in order to give transshippers a "message" that transshipping would not be tolerated. (Supersonic Brief at 26.) Thus, Supersonic introduced evidence of a series of other events in which Sonam did not demand that the customers provide affidavits with regard to their submission of faulty advertising claims. A review of the record, however, reveals that these instances do not give rise to any inference that Sonam sought to discourage transshippers. The principle incidents were

(a) the submission in 1973-75 of claims by three dealers for ads allegedly run on a Connecticut radio

station that turned out to be in Kentucky; Sonam eventually collected for the credits it had granted, but not until two years after the frauds were first discovered; it imposed no penalty on the dealers and did not require affidavits; one of the three claimants, however, was Nationwide, a buying group whose largest member was a transshipper;

(b) Sonam's lax review in 1976 and early 1977 of the advertising claims of national accounts; some of these accounts, however, included transshippers; indeed, one of the few dealers mentioned by name was Brick Church, a transshipper;

(c) Sonam's treatment of submissions by Corner Distributors of advertising claims that the 1977 eastern region audit led Sonam to suspect were overstated; no one questioned the running of the ads, but only their cost; the amounts were eventually substantiated to Sonam's satisfaction, and no repayments or affidavits were required; Corner Distributors was a transshipper;

(d) the submission of unsupported or questionable claims by five national accounts, discovered in 1977 in the expanded phase of the eastern region audit that unearthed the Computer Cast frauds; Sonam demanded repayment and received it, in most cases immediately, but it did not require the dealers to submit affidavits; one of these accounts, however, was NATM, a buying group that included Newmark & Lewis and Brick Church, two transshippers;

(e) the customary deductions by department stores for advertising credits prior to their submission of documentation; Sonam did not approve of this prac-

tice and sent repayment requests that were not honored but were apparently rendered moot by the later forwarding of documentation; and

(f) Sonam's discovery in 1979 of some $204,000 of false advertising claims submitted in the early 1970's by Hampton Sales (one of the Computer Cast Nine); in 1979 Sonam did not suspend sales to Hampton and neither demanded repayment nor requested affidavits; Sonam and Hampton officials testified that these newly-discovered false claims had been submitted by the previous owners of Hampton prior to 1975 and that insistence on repayment in 1979 would have forced the company into bankruptcy; in 1977 Hampton had promptly repaid the $52,887 in credits obtained through Computer Cast and given an affidavit, and had promptly been permitted to resume purchases of Sony products; Hampton was a large transshipper.

These instances hardly suggest, either independently or in comparison with the Computer Cast affair, that Sonam issued a "message" to discourage transshippers. In none of the above instances did Sonam treat any transshipper worse than a nontransshipper. Sonam required no affidavits, regardless of whether the offending customer was a transshipper or a nontransshipper. In no instance did it require repayment of amounts due it from a transshipper when it did not impose such a requirement on a nontransshipper. The only instance in which Sonam decided to forego repayment was one in which the false claims had come from a major transshipper. Sonam's treatment of the Computer Cast Nine was indeed more rigorous than its treatment of customers submitting other faulty claims; but since the less demanding responses were

directed toward all such customers, including those who were transshippers, none of the evidence creates any inference that Sonam and its customers had agreed that Sonam would discourage the activities of transshippers.

We conclude that neither the evidence adduced as to Sonam's communications with its dealers on the subject of transshipping, nor any other evidence in the record, taken independently or as a whole, provided a reasonable basis for an inference that in 1976 or 1977 Sonam and its dealers had entered into an agreement to discourage transshipping. Since the requisite proof of concerted action within the meaning of § 1 was lacking, the district court should have granted judgment for Sonam notwithstanding the jury's verdict.

CONCLUSION

The judgment of the lower court is reversed and the cause is remanded for the entry of judgment in favor of the defendant.

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, dated June 30, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

MENDEL SCHWIMMER d/b/a :
SUPERSONIC ELECTRONICS CO., :
Plaintiff-Appellee, :
–against– :
SONY CORPORATION OF AMERICA, :
Defendant-Appellant.

----------X

MOTION FOR MODIFICATION OF JUDGMENT

Brief statement of the relief requested:

Modification of the judgment to permit appellee to make a motion for a new trial in the District Court.

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied,

DATE: June 30, 1982

/S/ Jon O. Newman

/S/ Amalya Kearse

/S/ T.F. Gilroy Daly

CIRCUIT JUDGES

THIS PAGE LEFT BLANK INTENTIONALLY

APPENDIX E

Order of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co.* v. *Sony Corp. of America*, dated June 30, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---X

MENDEL SCHWIMMER d/b/a/ SUPERSONIC ELECTRONICS CO.,
Plaintiff-Appelee,
–against–
SONY CORPORATION OF AMERICA,
Defendant-Appellant.

---X

MOTION FOR MODIFICATION OF DECISION

Brief statement of the relief requested:

Correction of certain factual statements in the decision.

ORDER

Without necessarily accepting plaintiff's characterizations of the record, it is hereby ordered that the motion to modify the opinion published at Slip op. 2409-34 be and it hereby is granted to the following extent: (1) at page 24[illegible], line 13, the word "contractual" is inserted after "no" and before "restrictions", and (2) at page 2413, line 28, the phrase "on the asserted ground of" is inserted in place of the word "for".

DATE: June 30, 1982

/S/ Jon O. Newman

/S/ Amalya Kearse

/S/ District Judge T.F. Gilroy Daly

CIRCUIT JUDGES

THIS PAGE LEFT BLANK INTENTIONALLY

APPENDIX F

Judgment of the United States Court of Appeals for the Second Circuit, *Mendel Schwimmer d/b/a Supersonic Electronics Co. v. Sony Corporation of America* (2d Cir. May 3, 1982).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of May one thousand nine hundred and eighty-two.

Present: HON. JON O. NEWMAN, HON. AMALYA L. KEARSE, *C.JJ.* HON. T. F. GILROY DALY, *D.J.*

----------X

MENDEL SCHWIMMER d/b/a :
SUPERSONIC ELECTRONICS CO., :
Plaintiff-Appellee,:

—v.— :

SONY CORPORATION OF AMERICA, :
Defendant-Appellant.

----------X

No. 81-7135

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk
/s/ Arthur Heller
by Arthur Heller,
Deputy Clerk

THIS PAGE LEFT BLANK INTENTIONALLY

APPENDIX G

Opinion of the United States Court of Appeals for the Seventh Circuit, *Spray-Rite Service Corp. v. Monsanto Company*, — F.2d —, 1982-2 Trade Cas. [CCH] ¶64,808 (7th Cir. 1982).

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-1621, 80-2232, 80-2233, and 80-2624

SPRAY-RITE SERVICE CORPORATION, an Iowa corporation,
Plaintiff-Appellee,

v.

MONSANTO COMPANY, a Delaware Corporation,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Western Division.
No. 72-C-12—Stanley J. Roszkowski, *Judge.*

ARGUED MAY 15, 1981—DECIDED JUNE 28, 1982

Before BAUER, *Circuit Judge*, NICHOLS, *Associate Judge,** and WOOD, *Circuit Judge.*

BAUER, *Circuit Judge.* Spray-Rite Service Corporation ("Spray-Rite") brought this antitrust action against Monsanto Company alleging that Monsanto combined and conspired with some of its distributors to fix the resale price of Monsanto herbicides in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Spray-Rite's cause of action was tried to a jury before the Honorable

---

* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

Stanley J. Roszkowski. On February 21, 1980, the jury returned a verdict against Monsanto and awarded Spray-Rite $3,500,000. The district court trebled the verdict pursuant to 15 U.S.C. § 15. The Clerk of the District Court entered judgment the following day of "$10,500,000.00 plus interest at the legal rate." On March 11, 1980, Spray-Rite moved to amend the judgment to assess costs and attorneys' fees. The court granted Spray-Rite's motion on March 21, 1980.

The four separate appeals from the judgment below have been consolidated in this court. Monsanto appeals in 80-1621 from the order granting Spray-Rite's motion to amend the judgment to assess costs and attorneys' fees, and it appeals in 80-2232 from the verdict against it. Monsanto appeals in 80-2624 from the order awarding Spray-Rite $895,747.80 in attorneys' fees. Spray-Rite cross-appeals in 80-2233 from the original judgment to the extent that it failed to assess costs and attorneys' fees. We affirm the amended judgment against Monsanto, dismiss Spray-Rite's cross-appeal, and affirm in part and reverse and remand in part the award of $895,747.80 in attorneys' fees.

FACTS

Spray-Rite was engaged in the wholesale agricultural chemical distribution business from 1957 to 1972. Donald Yapp, Spray-Rite's owner and president, was the company's sole salaried salesman. Spray-Rite bought insecticides and herbicides from competing manufacturers, including Monsanto, and resold products to dealers and farmers.

Between 1957 and 1968, Monsanto manufactured two herbicides: Randox and Ramrod; it introduced a third product, Lasso, in 1968. Monsanto markets its herbicides primarily through independent, non-exclusive distributors. Monsanto assigns each distributor a geographic area of primary responsibility, but the distributors may sell outside that area. Approximately ten to twenty distributors are assigned to each area.

Monsanto sent a letter to each of its distributors in 1967 announcing that it would immediately appoint distributors for one year terms expiring automatically unless renewed by Monsanto. The letter described Monsanto's newly adopted criteria for evaluating distributor performance: (1) whether the distributor's primary activity was soliciting sales to herbicide dealers; (2) whether the distributor employed trained personnel capable of carrying out Monsanto's technical programs with dealers and farmers;[1] and (3) whether the distributor was fully exploiting the herbicide market in its area of primary responsibility. Yapp received the letter describing the evaluation criteria along with his one-year distributorship contract for 1967-68.

Monsanto notified Spray-Rite in 1968 that it would not renew Spray-Rite's distributorship. Of Monsanto's approximately 100 distributors, Spray-Rite was its tenth largest Ramrod distributor. Ninety percent of Spray-Rite's sales volume was devoted to herbicide sales, 16% of its sales were of Monsanto products, and 18% of its profits were derived from its Monsanto sales during the 1967-68 season.

Monsanto made several changes in its herbicide business after the 1967-68 season. In addition to introducing Lasso, Monsanto reduced the distributor and suggested resale prices of Ramrod and changed the suggested distributor profit margin from 11% to approximately 7%. Monsanto also adopted new shipping and pick-up policies. It made free deliveries to the Monsanto warehouse within the distributor's area of primary responsibility, but the distributor had to assume the additional shipping costs if it resold the products outside its primary area. Monsanto's new compensation programs included cash bonus payments to distributors for participating in Monsanto's technical schools and

[1] Monsanto's technical programs consist of instructing dealers and farmers on herbicide usage and effectiveness. Monsanto expects its distributors to provide salesmen to staff these programs.

demonstrations. Monsanto expanded the compensation programs in 1970 and 1972 to include distributor price discounts on herbicides resold to dealers who had attended Monsanto's technical programs. Monsanto also gave price discounts, which were rebated to the distributor at the end of the season, on orders purchased early in the season.

Spray-Rite attempted to purchase Monsanto herbicides from other distributors after its distributorship was terminated.[2] It was unable to purchase any Lasso at all during the 1968-69 season. It did obtain some Ramrod, but not so much as it desired or so early in the season as it needed. Spray-Rite went out of business in 1972. It contends that Monsanto's unlawful business practices drove it out of business.

Spray-Rite claims that Monsanto and some of its distributors conspired to fix the resale price of Monsanto herbicides. Spray-Rite contends that Monsanto terminated Spray-Rite's distributorship, adopted compensation programs and shipping policies, and encouraged distributors to boycott Spray-Rite in furtherance of this conspiracy.

The district court instructed the jury that it should find Monsanto's conduct per se unlawful if it found that Monsanto engaged in the alleged conduct in furtherance of a conspiracy to fix resale prices. The court also gave the jury three special interrogatories.

> 1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

---

[2] Monsanto did not terminate the Spray-Rite distributorship; it simply refused to renew the distributorship when the 1967 contract expired. For purposes of our discussion, however, we will use "refused to renew" and "terminated" interchangeably. *See Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980).

2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

The jury responded "yes" to each interrogatory and returned a general verdict against Monsanto awarding Spray-Rite $3,500,000 in damages.

No. 80-2232: Monsanto's appeal from the verdict.

Monsanto argues three separate grounds for reversal. First, it asserts that the jury charge contained material misstatements of the law governing the issues in this case. Second, Monsanto contends that there is insufficient evidence to support the verdict. Third, Monsanto argues that the district court made several erroneous evidentiary rulings. We find none of Monsanto's arguments persuasive, and, accordingly, we affirm the judgment of the district court.

I. *The Jury Charge*

We must consider alleged errors in jury instructions in light of the adequacy of the charge as a whole. *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226 (7th Cir. 1980). The district court instructed the jury generally concerning Spray-Rite's theory of the case. It also instructed the jury that Spray-Rite bore the burden of proof, including the burden of proving the existence of a conspiracy to fix the resale price of Monsanto herbicides. The instructions defined "conspiracy" and explained that some types of restraints are per se unlawful. The court then instructed the jury concerning termination of distributorships, boycotts, and the use of vertical restrictions. After carefully reviewing the entire

jury charge, we are convinced that the instructions in this case were proper.

A. *Termination of the Spray-Rite Distributorship*

The court instructed the jury that a manufacturer has the right to select its distributors and set a suggested resale price for its products. The instructions explained that this right is limited, however, because the manufacturer may not coerce distributors to follow its suggested price by threatening to terminate their distributorships. The court then instructed the jury that "[i]f the manufacturer's selection [of a distributor] is accompanied by unlawful *purpose*, conduct *or* agreement, it violates the Sherman Act." Tr. at 4363 (emphasis added). Monsanto contends that these instructions gave the jury the incorrect impression that a manufacturer that unilaterally decides to terminate a distributor violates the Sherman Act if the manufacturer had an improper motive.

A manufacturer may unilaterally fix a suggested resale price for its product. *United States v. Colgate*, 250 U.S. 300 (1919). It may also lawfully refuse to deal with any distributor that resells the product at a price other than that it has suggested. *Id.* If, however, the manufacturer does anything more than merely announce the suggested resale price and then refuse to deal with distributors that fail to comply with that price, the manufacturer is engaged in a per se unlawful resale price maintenance scheme. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944); *FTC v. Beech-Nut Co.*, 257 U.S. 441 (1922). An unlawful resale price maintenance scheme can be effected in either of two ways: the manufacturer and its distributors may enter into an express or implied agreement to maintain a fixed resale price, *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944), or the manufacturer may secure adherence to its suggested resale price through coercion, including threats to terminate distributors if they do not follow the suggested price. *United States v. Parke, Davis*

& Co., 362 U.S. 29, 43 (1960). The manufacturer may not terminate a distributor if (1) the termination is at the request of a competing distributor *and* (2) the termination is motivated by a desire to reduce or eliminate price competition for the manufacturer's products. *Contractor Utility Sales Co., Inc. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 & n.9 (7th Cir. 1981); *Alloy International Co. v. Hoover-NSK Bearing Co., Inc.*, 635 F.2d 1222, 1225-26 (7th Cir. 1980). *See also Battle v. Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 169-70 (3d Cir. 1979).

We agree with Monsanto that the jury should not have been instructed that a manufacturer's unilateral decision to terminate a distributor is unlawful if based on an improper motive. A manufacturer's unilateral termination of a distributor is not unlawful regardless of whether it is motivated by an illegal purpose. *United States v. Colgate*, 250 U.S. 300 (1919). We believe, however, that this one inaccuracy was harmless. The entire jury charge informed the jury that Spray-Rite had to prove the existence of an agreement, conspiracy, or combination and that Monsanto's termination of Spray-Rite was unlawful only if the decision to terminate was not unilateral.[3] The entire charge correctly instructed

[3] The court gave the following instructions concerning Spray-Rite's claim that Monsanto unlawfully terminated the Spray-Rite distributorship:

> The fact that distributors complain about prices or anything else does not in itself mean that a conspiracy existed. Even if you find that Monsanto acted in exactly the way that complainants would have wished, that does not prove the existence of a conspiracy; it would, however, be evidence that you can take into consideration in deciding whether or not a conspiracy existed.
>
> * * * *
>
> It is also unlawful for a manufacturer to terminate or threaten to terminate one of its distributors for the reason that the distributor objected to, or departed from either the manufacturer's price-fixing or stabilization plan or

(Footnote continued on following page)

the jury that Spray-Rite had to adduce evidence of an illegal purpose *and* an unlawful combination, conspiracy,

[3] *continued*

any customer or territorial restraints which are part of that plan. Therefore, if you find that termination or threat of termination was utilized by the defendant as a coercive tool against the plaintiff or any other distributor of defendant to force adherence to any aspect of a resale price maintenance plan, such termination or threat of termination is unlawful. It does not matter whether the defendant initiated the coercion, or whether it was done in response to pressure or complaints from one or more of its distributors.

A termination or threat of termination to compel adherence to any aspect of a resale price maintenance plan is unlawful, whether or not there was any reasonable justification.

• • • •

The law recognizes a limited right in the manufacturer to select its distributors, but that right is neither absolute nor exempt from regulation. If the manufacturer's selection is accompanied by unlawful purpose, conduct or agreement, it violates the Sherman Act.

A manufacturer may announce suggested resale prices and refuse to sell to a distributor which refuses to abide by those suggested prices. However, the manufacturer's conduct must be totally independent. In deciding whether the manufacturer's conduct was completely independent and unilateral, you should look to what the participants did, rather than the words they used.

Therefore, the defendant's limited right to choose its distributors does not include the right to, in any way, conspire or combine with one or more of its distributors to fix or stabilize resale prices, or to refuse to deal, or to commit any other act which has been described in these instructions as a per se violation of the antitrust laws.

• • • •

The defendant has a right to select distributors that it thinks will do the best job for it provided that in doing so the defendant's decision not to renew the plaintiff's contract was not made pursuant to a price-fixing conspiracy or combination.

Tr. at 4354, 4356-57, 4363, 4364.

or agreement to prove that Monsanto's refusal to renew the Spray-Rite distributorship was unlawful.[4]

B. *Post-Termination Boycott of Spray-Rite*

Monsanto contends that the court's boycott instructions were erroneous. The court instructed the jury that a group boycott is per se unlawful and that it should find that Monsanto violated section 1 of the Sherman Act if it found that Monsanto agreed with some of its distributors to terminate Spray-Rite's distributorship or limit Spray-Rite's access to Monsanto products. Monsanto argues that only horizontal combinations to boycott are subject to the per se rule and that vertically imposed boycotts are subject to rule of reason analysis. Monsanto contends that the per se instruction should not have been given because Spray-Rite only introduced evidence of a *vertical* agreement between Monsanto and its distributors.

Certain types of group boycotts are among the practices that the Supreme Court has deemed to be per se unlawful. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores,*

---

[4] Monsanto further claims that the instructions were incomplete because the district court refused to give an instruction Monsanto tendered. The court did not err in refusing to give Monsanto's tendered instruction because the instruction is erroneous. Monsanto requested that the court instruct the jury that:

> As long as its decision not to renew plaintiff's distributorship was not made pursuant to a conspiracy or combination to fix prices, defendant even had the right to agree with other distributors not to renew plaintiff's contract.

Tr. at 4206. Monsanto, however, could not lawfully terminate Spray-Rite's distributorship pursuant to an agreement with its distributors because such conduct is a concerted refusal to deal which is per se unlawful even if not part of a scheme to fix resale prices. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Inc., 359 U.S. 207 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). Not all boycotts, however, are per se unlawful. *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781 (7th Cir. 1981); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966), *reh. denied*, 385 U.S. 1032 (1967). A per se unlawful boycott has two essential elements: (1) at least some of the boycotters are competitors of each other and the target and (2) the boycott is designed to protect the boycotters from competition with the target. *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 788 (7th Cir. 1981).

Spray-Rite claims that Monsanto and some of its distributors agreed to boycott it. This is precisely the type of group boycott that the Supreme Court held per se unlawful in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In *Klor's*, a manufacturer and several retail stores agreed to boycott a retail store that competed with some of the boycotters. In *General Motors Corp.*, General Motors agreed with some of its dealers to boycott other dealers selling GM automobiles at reduced prices. In this case, according to Spray-Rite, Monsanto, like General Motors, agreed with some of its distributors to boycott Spray-Rite, a competing distributor. Spray-Rite's theory, if supported by the evidence, presents a "classic" group boycott in which there is "'a concerted attempt by a group of competitors at one level to protect itself from competition from non-group members who seek to compete at that level.'" *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 788 (7th Cir. 1981), *quoting Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978). The district court did not err in giving a per se boycott instruction.

The district court instructed the jury that it could consider Monsanto's compensation programs as evidence of

Monsanto's conspiracy to boycott Spray-Rite.[5] Monsanto claims that this instruction is erroneous because it suggests that the jury could find a conspiracy to boycott Spray-Rite if it found (1) that Monsanto's territorial policies and compensation programs had an adverse effect on Spray-Rite and (2) that other distributors participated in the programs.

Monsanto has taken this instruction out of the context of the entire jury charge. The court instructed the jury that it could find a conspiracy only if it found that Monsanto and some of its distributors agreed to boycott Spray-Rite. The jury was instructed that "[m]ere similarity of conduct among various persons . . . does not necessarily establish proof of the existence of a conspiracy." Tr. at 4351. The entire jury charge properly instructed the jury concerning the elements of a conspiracy to boycott. The court did not err in instructing the jury that it could consider the effect of Monsanto's compensation programs as circumstantial evidence of the conspiracy to boycott.

C. *Monsanto's Compensation Programs and Shipping Policies*

Finally, Monsanto contends that the instructions concerning Monsanto's compensation programs and shipping policies were erroneous. The court instructed the jury that it is per se unlawful for a manufacturer to utilize customer or territorial restrictions as part of a comprehensive price-fixing plan or boycott. Monsanto claims that the court should have instructed the jury to determine the lawfulness of its compensation programs

---

[5] The instruction stated:

> The fact that some of Monsanto's policies may have affected the price paid by all non-contract sellers, including plaintiff, does not necessarily establish a conspiracy, but may be evidence which you can consider along with all the other evidence in the case in deciding whether a conspiracy existed.

Tr. at 4365.

and shipping policies pursuant to the rule of reason rather than the per se rule. Monsanto's reliance on *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), in support of its argument, however, is misplaced.

In *Continental T.V.*, the Supreme Court held that the rule of reason, rather than the per se rule, applies in cases involving nonprice vertical location restrictions. 433 U.S. at 41 n.9. The Court held that the interbrand competition stimulated by the restrictions may outweigh the negative effects the restrictions have on intrabrand competition. Nothing in the Court's opinion, however, implies that it intended to limit *United States v. Sealy*, 388 U.S. 350 (1967), in which it held that otherwise lawful vertical restrictions imposed as part of an unlawful scheme to fix prices are per se unlawful. In *Sealy*, the Government argued that Sealy's policy of restricting its licensees to a single manufacturing and resale area was part of a per se unlawful market allocation and price-fixing scheme. Sealy responded that the restriction was a mere incident to its lawful trademark licensing. The Court rejected Sealy's contention and held that the manufacturing and resale restrictions were unlawful because they were part of a per se unlawful price-fixing scheme. "The territorial restraints were a part of the unlawful price-fixing and policing . . . . [I]ts connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint." *Id.* at 356-57.

United States v. Sealy rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices. 433 U.S. at 41 n.9 & 51 n.18. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the per se rule.

The instruction about which Monsanto complains is similar to an instruction we approved in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979), *later appeal*,

669 F.2d 490 (7th Cir. 1982). Sealy's licensing agreement included a right-of-first-refusal clause granting Sealy the right to buy a franchise if it were put on the market and a clause requiring licensees to pay special charges to Sealy for any sales made outside a licensee's area of primary responsibility. Ohio-Sealy conceded that these contract terms were lawful in themselves but claimed that they were part of an illegal horizontal scheme to allocate markets and, thus, were per se illegal. The jury was so instructed, and we affirmed. *Accord, Mishawaka, Indiana v. American Electric Power Co., Inc.*, 616 F.2d 976, 986 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096, *reh. denied*, 450 U.S. 960 (1981). In this case, the court instructed the jury that Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful if undertaken as part of an illegal scheme to fix prices. We find, as we did in *Ohio-Sealy*, that this instruction is accurate. "In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained." *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963) (citation omitted). *Accord, United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966).[6]

II. *Sufficiency of the Evidence*

Monsanto contends that the evidence is insufficient to support the verdict. Monsanto initially claims that

[6] Monsanto's reliance on *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980), *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978), and *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977), is misplaced. Both *Cowley* and *General Beverage* are inapposite because the plaintiffs in those cases failed to allege that the distributors' territorial restrictions were ancillary to per se unlawful price-fixing schemes. *FLM Collision Parts, Inc.* is inapplicable because the Ninth Circuit found that the plaintiff had failed to prove the existence of a price-fixing conspiracy. Therefore, the rule of reason rather than the per se rule applied in those cases, which involved non-price, vertical restraints.

Spray-Rite failed to prove that Monsanto terminated Spray-Rite's distributorship as part of a conspiracy to fix resale prices or that Monsanto combined with its distributors to boycott Spray-Rite. Monsanto argues in the alternative that even if Spray-Rite proved liability, it failed to prove the nature and extent of any actual damages caused by Monsanto's unlawful business practices.

In reviewing the trial court, we must weigh conflicting evidence and inferences most favorably to the prevailing party. *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 479 (7th Cir. 1980). If there is any substantial evidence in the record to support the jury's verdict, we must affirm the judgment. *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

A. *Termination of the Spray-Rite Distributorship*

Monsanto claims that Spray-Rite failed to prove that Monsanto terminated the Spray-Rite distributorship pursuant to a conspiracy to fix the resale price of Monsanto herbicides. Monsanto contends that Spray-Rite had to prove either (1) that Monsanto agreed with Spray-Rite's competitors to terminate Spray-Rite in order to fix the resale price of Monsanto herbicides, *Contractor Utility Sales Co., Inc. v. Certain-Teed Products Corp.*, 638 F.2d 1061 (7th Cir. 1981), or (2) that Monsanto fixed resale prices of its herbicides by coercing distributors to adhere to its suggested prices. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Monsanto contends that Spray-Rite failed to sustain its burden of proof on either of these two theories. First, Monsanto claims that Spray-Rite failed to prove the existence of an agreement between Monsanto and some of its distributors to terminate Spray-Rite. Spray-Rite was only able to show that Monsanto was concerned about the resale price of its herbicides and that it received some price complaints about Spray-Rite from other distributors. Moreover, Monsanto argues that it proved that it had valid business reasons for terminating Spray-Rite. Second,

Monsanto contends that Spray-Rite failed to prove that Monsanto fixed the resale price of its herbicides by coercing distributors to adhere to Monsanto's suggested resale prices. Monsanto argues that the evidence showed that Monsanto's distributors failed to adhere to the suggested prices and, consequently, there was extensive intrabrand price competition.

Monsanto argues that evidence of price complaints coupled with evidence of termination in response to those complaints is insufficient to prove the existence of a resale price maintenance agreement. It relies on *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), in which the Third Circuit held that proof of competitor complaints followed by termination is insufficient to create an inference of concerted action.

We believe, however, that proof of termination following competitor complaints is sufficient to support an inference of concerted action. In *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), the Eighth Circuit declined to follow *Sweeney* and held "that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action." *Id.* at 991 (emphasis in original).[7] We agree. Proof of distributorship termina-

[7] Monsanto relies on *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982), as an indication that the Eighth Circuit has not rejected the *Sweeney* rule. In *Roesch*, the court affirmed the district court order directing a verdict against the plaintiff who claimed that Star Cooler Corporation conspired with two of its distributors to terminate Roesch's distributorship because Roesch was a price-cutter. The sole evidence of the alleged conspiracy was proof of price complaints and proof of termination. The Eighth Circuit held "that mere complaints by customers of a manufacturer that distributors and dealers engage in price-cutting are not enough to imply a conspiracy in violation of section 1." *Id.* at 1172.

(Footnote continued on following page)

tion in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, No. 81-3016, slip op. at 3 (7th Cir. May 21, 1982). *See also Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222 (7th Cir. 1980) (a terminated distributor presents sufficient evidence to support a verdict in its favor by proving (1) that the manufacturer received price complaints from the distributor's competitors, (2) that the manufacturer was concerned about raising its wholesale price and recognized that its ability to do so might be influenced by the distributor's prices, and (3) that the manufacturer terminated the distributorship).

Spray-Rite satisfied this burden of proof. Thomas Dille, a former Monsanto District Manager for Spray-Rite's area of primary responsibility, testified that he received numerous complaints about Spray-Rite's price-cutting practices. He further testified that some distributors requested that Monsanto terminate Spray-Rite's supply of Monsanto herbicides. James Hopkins, president of Hopkins Agricultural Chemical Company, a Monsanto distributorship in competition with Spray-Rite, testified that he complained to Monsanto about Spray-Rite's prices. Emmett McCormick, a former Monsanto Area Supervisor, testified that Monsanto was concerned about stabilizing the resale price of its herbicides and that Monsanto considered Spray-Rite a price-cutter. Yapp, president of Spray-Rite, testified that various Monsanto District Managers in 1966, 1967, and 1968 threatened to terminate his distributorship if he did not raise his prices. Finally, Monsanto did terminate Spray-Rite in 1968.

Monsanto claims that it terminated Spray-Rite because Spray-Rite was not satisfying Monsanto's an-

---

[7] *continued*

The Eighth Circuit decided both *Roesch* and *Battle* on March 4, 1982. Neither opinion cited or discussed the other. To the extent that the holdings in these two cases conflict, we follow *Battle*.

nounced distributorship criteria. William Bone, a Monsanto District Sales Manager, testified that Spray-Rite lacked technically trained employees capable of promoting Monsanto products. Bone admitted, however, that he never discussed the distributorship criteria with Yapp and that neither he nor anyone else from Monsanto informed Yapp in 1968 that Spray-Rite was failing to meet Monsanto's criteria. Moreover, Allen Davis, a Monsanto Manager of Marketing Administration, testified that Spray-Rite was the tenth largest purchaser of Monsanto products in 1968. Davis further testified that Monsanto gave Spray-Rite no written reasons for termination. Yapp testified that Donald Fischer, a Monsanto District Manager, told him that Monsanto terminated Spray-Rite because of price complaints about Spray-Rite. Although the evidence concerning Monsanto's reasons for terminating Spray-Rite was conflicting, the jury was not required to accept Monsanto's version of the case.[8] There was sufficient evidence to support the jury's verdict that Monsanto terminated Spray-Rite pursuant to a conspiracy with other distributors to fix the resale price of Monsanto herbicides.[9]

---

[8] Monsanto's reliance on *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), is misplaced. Eli Lilly told H.L. Moore that its distributorship would be terminated unless Moore complied with Lilly's long-standing rule prohibiting wholesalers from owning retail pharmacies. The only evidence of a conspiracy to fix resale prices was evidence of a price complaint from one distributor. The plaintiff simply failed to adduce sufficient evidence of a conspiracy to terminate its distributorship. In this case, however, we have evidence of many complaints coupled with evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite.

[9] Because we hold that Spray-Rite presented sufficient evidence to support the jury's verdict on its theory that Monsanto terminated the Spray-Rite distributorship pursuant to a resale price maintenance agreement between Monsanto and some of its distributors, we need not decide whether Spray-Rite presented sufficient evidence to support a verdict based on the theory that Monsanto effectuated its resale price maintenance scheme by coercing distributors into adhering to Monsanto's suggested resale price.

B. *Post-Termination Boycott of Spray-Rite*

Monsanto argues that Spray-Rite failed to adduce sufficient evidence to support the jury's finding that Monsanto combined with some of its distributors to boycott Spray-Rite because the evidence showed that Spray-Rite was able to purchase some Monsanto herbicides from Monsanto distributors after it was terminated. We disagree.

Yapp testified that he contacted several distributors after Spray-Rite was terminated, and they refused to sell Monsanto herbicides to Spray-Rite. John Mulvehill of Mid-State Chemical Company testified that he refused to deal with Spray-Rite because Stewart Daniels and Max Albertson of Monsanto threatened to terminate Mid-State's distributorship if it sold to Spray-Rite. Moreover, Emmett McCormick of Monsanto testified that Monsanto attempted to prevent Spray-Rite from obtaining Monsanto herbicides after termination. He also testified that he told Fred Bailey of Associated Producers not to sell to Spray-Rite. This evidence is sufficient to support the jury's finding that Monsanto and some of its distributors engaged in an unlawful group boycott of Spray-Rite. *E.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966).[10]

C. *Proof of the Amount of Damage*

Finally, Monsanto claims that Spray-Rite's evidence of the damage suffered is insufficient to support the untrebled jury verdict of $3,500,000. Dr. Urban Ozanne,

[10] Monsanto's reliance on *McClure v. Undersea Industries, Inc.*, 671 F.2d 1287 (11th Cir. 1982), is misplaced. McClure claimed that several of Undersea Industries' other distributors boycotted McClure after Undersea terminated McClure's distributorship. The Eleventh Circuit reversed the judgment in favor of McClure on the sole ground that McClure failed to prove any damages caused by the boycott. *Id.* at 1291. The court, however, never reached the issue of whether McClure presented sufficient proof of a conspiracy to boycott. *McClure*, thus, is inapposite.

Professor of Marketing and Chairman of the Marketing Department, College of Business, Florida State University, presented the only testimony concerning the amount of damage caused by Monsanto's unlawful practices. Dr. Ozanne testified that Monsanto's termination of Spray-Rite, the post-termination boycott, Monsanto's post-termination compensation programs, delivery policies, and territorial restrictions forced Spray-Rite out of business in 1972. He further testified that Spray-Rite's sales decreased between 1968 and 1972 because of Spray-Rite's inability to obtain a sufficient quantity of Monsanto products. He calculated that Spray-Rite lost profits of $3,327,588 between 1968 and 1978. Dr. Ozanne's $3,327,588 calculation included losses incurred between 1968 and 1972 when Spray-Rite's sales were declining and losses incurred between 1972 and 1978 when Spray-Rite was out of business.

Dr. Ozanne did not attempt to account separately for the amount of damage caused by each of the Monsanto business practices he considered. He admitted that relying on his testimony, the jury would be unable to determine the amount of damage caused by each practice. He contended that "it would be very difficult" to compute the amount of damage caused by each practice "because these things merge together and interact among themselves—very difficult. You would have to make tremendous assumptions." Tr. at 2897. He did testify, however, that Monsanto's challenged business practices were the sole causes of all of Spray-Rite's damages.

In calculating the amount of damages, Dr. Ozanne used a regression analysis based on Spray-Rite's past performance, projected future performance, and industry trends. He testified that he used statistics, economics, econometrics, and cost accounting in reaching his conclusions, but admitted that he is not an expert in any of these fields. He also testified that he used a computer to check his calculations, but admitted that he is not a computer expert and that he did not write the computer programs that he used.

1. *Admissibility of Dr. Ozanne's Testimony*

Monsanto claims that because Dr. Ozanne admitted he was not an expert in all the fields of study on which he relied in preparing his damage testimony, the district court erred in permitting him to testify as an expert.

An expert must be "qualified as an expert by knowledge, skill, experience, training, or education." Rule 702, Fed. R. Evid. The district court is vested with broad discretion to determine whether a proffered expert is qualified to testify. We will reverse the court's ruling on the admissibility of expert testimony only upon a clear showing of abuse of discretion. *United States v. West*, 670 F.2d 675 (7th Cir. 1982); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Monsanto has failed to make such a showing.

Dr. Ozanne is qualified as an expert. He is a recognized marketing expert. *Greene v. General Foods Corp.*, 517 F.2d 635, 660 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). He testified that he obtained his doctorate in business administration from Indiana University in 1967; his major was marketing and his minors were economics, management, and international business. He has published articles concerning procedures for computing business damages. He has consulted concerning forecasting sales, expenses, and profits, and he has testified about these subjects in other cases. Although Dr. Ozanne is not an expert in computers, regression analysis, statistics, economics, econometrics, or cost accounting, he is trained to use these methods. Moreover, he testified that marketing analysts "constantly" use these methods. Tr. at 3005-07. The fact that Dr. Ozanne is not an expert in all the fields of studies on which marketing analysts regularly rely "does not make him obviously unqualified in light of his other credentials and experience." *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1003 (9th Cir. 1981).

Monsanto claims that the district court erred in admitting Dr. Ozanne's testimony because his opinion was not based on facts as required by rule 703 of the Federal

Rules of Evidence. Dr. Ozanne testified that Spray-Rite's damages were caused by Monsanto's conspiracy to fix the resale price of Monsanto products and to boycott Spray-Rite. He testified that the conspiracy was the "only event of substance" that affected Spray-Rite's business after 1968. He admitted, however, that any other events of substance necessarily would have affected the accuracy of his damages projection if they had occurred. Monsanto claims that the evidence at trial indicated that other events of substance did occur after 1968, including an industry increase in interbrand and intrabrand competition. Monsanto argues that Dr. Ozanne's damage opinion is not based on facts because he failed to consider the effect of these other events of substance, and, thus, his testimony should have been excluded. Moreover, Monsanto argues that Dr. Ozanne's testimony should have been excluded because he improperly included in his damages calculation Spray-Rite's post-1972 loss of customers who never purchased Monsanto products.

Several herbicide distributors, including Donald Yapp, testified that a distributor needed to carry all brands of herbicides because dealers and farmers wanted to buy all their herbicides from one seller. Monsanto, of course, disagrees. Nevertheless, this was a fact in evidence upon which Dr. Ozanne could properly base his damage calculation. Similarly, Dr. Ozanne could properly conclude that no other events of substance occurred and rely on the causes of damage he cited. Dr. Ozanne's failure to consider the effect of factors Monsanto argued he should have considered reflects on his credibility, but it does not make his testimony inadmissible.

Finally, Monsanto argues that the district court should have excluded Dr. Ozanne's testimony because Spray-Rite cannot recover damages for the destruction of its entire business. Monsanto relies on *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980), in which we noted that "[t]he favored method of ascertaining damage in antitrust litigation is to consider only that product line or market in which the

plaintiff suffered injury rather than plaintiff's entire business." *Id.* at 483 (citations omitted). In *Trabert & Hoeffer*, however, the plaintiff's entire business was not destroyed by the defendant's unlawful termination of Trabert & Hoeffer's Piaget distributorship. If the defendant's unlawful conduct causes the plaintiff to go out of business, the plaintiff is entitled to recover the full amount of that loss. *Shor-line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976).[11]

2. *Disaggregation of Damage Sum*

Monsanto claims that the evidence is insufficient to support the $3,500,000 verdict because Spray-Rite failed to prove how much damage was caused by each of the challenged Monsanto practices. Monsanto claims that an antitrust plaintiff bears the burden of disaggregating its damage sum and proving the amount of damage attributable to each of the defendant's challenged business practices.

The plaintiff bears the burden of proving the amount of damage suffered as a result of the defendant's unlawful conduct. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931). There are, however, practicable limits to the scope of this burden. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-24 (1969). Because a plaintiff can seldom prove the exact amount of antitrust damages, he may sustain his burden with circumstantial evidence and estimates of damage based on reasonable assumptions. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 879 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

---

[11] Monsanto also argues that Dr. Ozanne's opinion testimony should have been excluded because he included damages caused by Monsanto's compensation and shipping policies which Monsanto claims were lawful practices. There was sufficient evidence to support Dr. Ozanne's and the jury's conclusion that these policies were in fact part of Monsanto's unlawful conspiracy. *See* discussion section I.,C. *supra*.

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946).

Dr. Ozanne testified that three factors combined to cause Spray-Rite's damages: (1) Monsanto's termination of the Spray-Rite distributorship; (2) Monsanto's post-termination marketing progams, including the compensation and technical programs, and (3) Monsanto's post-termination marketing policies, including Monsanto's assigned areas of primary responsibility and delivery policies. He testified that it would be "very difficult" to apportion the amount of damage caused by each of these factors "because these things merge together and interact among themselves." Tr. at 2897. Monsanto did not present any evidence refuting Dr. Ozanne's conclusions.

A plaintiff claiming injury caused by more than one of the defendant's unlawful practices need not prove the amount of damage caused by each illegal practice if the plaintiff shows that disaggregation is impracticable. If the plaintiff shows that such proof is impracticable, the burden shifts to the defendant to demonstrate the contrary. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp 423, 434 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981). Any other rule would permit the defendant to escape compensating the plaintiff if the defendant's wrongful conduct were sufficiently varied and effective to render more exact proof of damage impossible. "[A] defendant whose wrongful conduct has rendered difficult the ascertainment of precise damages suffered by the plaintiff is not

entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 484 (7th Cir. 1980). Spray-Rite sustained its burden by proving that disaggregation was impracticable; Monsanto failed to rebut Spray-Rite's evidence by showing that disaggregation was indeed possible.

Monsanto argues that we ought to reverse the jury verdict because the second interrogatory indicates that the jury may not have found that the illegal conspiracy included Monsanto's compensation programs *and* its areas of primary responsibility *and* its shipping policy.[12] Assuming that the jury did not find all three practices part of the conspiracy, Monsanto alleges that the jury verdict awarding the total aggregated damage amount requires Monsanto to compensate Spray-Rite for lost profits caused by Monsanto's lawful competition.

The only damage evidence introduced at trial established that it was impracticable to disaggregate the damage sum and apportion the amount of damage caused by each of Monsanto's business practices. Because the jury responded "yes" to the second interrogatory, it found at least one of the named practices—the compensation programs, the areas of primary responsibility, or the shipping policy—part of the unlawful resale price maintenance scheme. Clearly, Spray-Rite is entitled to recover the lost profits caused by Monsanto's anticompetitive business practices. We will not deprive Spray-Rite of this recovery merely because the jury may

---

[12] The second interrogatory, to which the jury responded "yes", asked:

> Were the compensation programs *and/or* areas of primary responsibility, *and/or* shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

Monsanto requested that the interrogatory be phrased in the conjunctive, but the court inserted the "or" at Spray-Rite's request.

have found that Monsanto combined lawful conduct with unlawful conduct making it impossible to determine which portion of the total damages was caused by the unlawful conduct. *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d at 484.[13]

Finally, Monsanto argues that the jury verdict must be reversed because it is excessive. The only evidence at trial concerning the amount of damage was Dr. Ozanne's testimony that Spray-Rite suffered $3,327,588 damage. The jury awarded Spray-Rite $3,500,000. We agree with Monsanto that $172,412 of the verdict is excessive. *Alover Distributors, Inc. v. Kroger Co.*, 513 F.2d 1137, 1141-42 (7th Cir. 1975). Reversal is unnecessary, however, if Spray-Rite will accept a remittitur of $172,412. If Spray-Rite will consent to the remittitur, the judgment shall be reduced to $3,327,588 and this reduced judgment will be affirmed. If Spray-Rite refuses to accept the remittitur, the judgment will be reversed and the case remanded for a new trial on the question of the amount of damages. *Id.*

III. *Evidentiary Challenges*

Monsanto claims that the district court made several erroneous evidentiary rulings. Monsanto claims that the court erred (1) in failing to exclude speculative

[13] *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981), on which Monsanto relies, is not to the contrary. ILC Peripherals claimed that several of the defendant's business practices were unlawful restraints of trade and that these practices caused it to suffer total damages of $306,580,000. The district court directed a verdict in defendant's favor on the ground that plaintiff had failed to prove its damages with sufficient specificity. In *ILC Peripherals Leasing Corp.*, however, there was evidence that disaggregation was possible. Where it is possible to apportion the amount of damages caused by the unlawful conduct alone, the defendant cannot be held liable for the plaintiff's losses attributable to lawful competition.

testimony, (2) in admitting hearsay statements attributed to distributors that were not shown to be co-conspirators, (3) in excluding Monsanto's rebuttal witness, and (4) in permitting Spray-Rite to make a "Golden-Rule" appeal during closing argument.

We will reverse a jury verdict because of an erroneous evidentiary ruling only upon a clear showing that the error affected "a substantial right of the party." Rule 103, Fed. R. Evid. If the error was harmless, the jury verdict must be affirmed. Rule 61, Fed. R. Civ. P. After careful review of the record, we are convinced that any errors that occurred were harmless.

A. *Speculative Testimony*

A witness may not testify to a matter unless he has personal knowledge of that matter. Rule 602, Fed. R. Evid. Monsanto contends that the district court erred in permitting Michael Flynn, a former Monsanto field salesman, and David Stein, a Monsanto District Sales Manager, to testify concerning Monsanto's reasons for refusing to renew Spray-Rite's distributorship. It is clear from Flynn's and Stein's testimony that they did not know why Monsanto terminated Spray-Rite. Although the court erred in admitting this speculative testimony, the error was harmless. Both men's testimony indicated that they were stating their respective opinions as to why Spray-Rite might not be their choice as a distributor. The jury could not have understood their testimony to be anything other than an opinion. Moreover, Flynn's response was consistent with Monsanto's defense that it refused to renew the Spray-Rite distributorship because Spray-Rite was not meeting the distributorship criteria.[14] David Stein's testimony, on the

[14] The following exchange occurred during Flynn's direct examination:

> Q. My question is, did you have conversations with Monsanto representatives about these factors as contributing to Spray-Rite's non-renewal as a distributor?

(Footnote continued on following page)

other hand, was merely cumulative because his testimony corroborated that of other witnesses with personal knowledge.[15] "Where testimony is improperly admitted but 'was merely cumulative on matters which were clearly shown by other admissible evidence [then] . . . the admission of such testimony was harmless.'" *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 292-93 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969) (citations omitted).

B. *Hearsay Testimony*

Yapp testified that two Monsanto distributors, Phil James of Mid West Agriculture and Leo Sterk of Laverty Sprayers, refused to sell Monsanto products to Spray-Rite after its distributorship was terminated. Yapp testified that James explained that Fred Lane of Monsanto had told him to restrict his sales to Mid West's area of primary responsibility. Yapp also testified that Sterk explained that Laverty could not sell Monsanto

---

[14] *continued*

A. We weren't asked reasons as to why Spray-Rite was discontinued. As I said, this was done before my entry into the territory; and *hypothesizing with other salesmen* as to who we would want as distributors and who we were glad we didn't have as distributors, Don Yapp's name did come up. *And aside from not meeting the criteria, it was that price was a factor as to why people would not want him as a distributor.*

Tr. at 160 (emphasis added).

[15] Monsanto complains that the following colloquy should have been excluded:

Q. . . . Do you know of any instances where instructions were given from the—or from anyone that these--that any terminated distributors were not to get Monsanto products?

A. . . . I do know that the internal attitude towards Spray-Rite was vehement enough that *if there was instructions* given against anybody, *it could have been* against Spray-Rite because they did not like him at all.

Tr. at 2406 (emphasis added).

products to Spray-Rite at a lower price without risk of termination. Sterk testified that he could not recall giving that reason to Yapp as an explanation of why Laverty would not lower its price. Monsanto claims that Yapp's hearsay testimony should have been excluded because Spray-Rite failed to show by a preponderance of the evidence that Mid West and Laverty were part of the conspiracy to boycott Spray-Rite. *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978).

Independent, non-hearsay evidence linked Mid West to the conspiracy. Spray-Rite introduced a memorandum dated November 16, 1970, in which Lane memorialized a conversation with James. The memorandum indicated that Lane reminded James to follow Monsanto's "sales policies." Other evidence indicated that Monsanto's "sales policies" included assigning areas of primary responsibility and encouraging sales in those areas. This evidence is sufficient to link Mid West with the conspiracy. The court did not err in admitting Yapp's hearsay testimony concerning his conversation with Phil James.

Because no evidence linked Laverty Sprayers to the conspiracy to boycott Spray-Rite, Yapp's hearsay testimony concerning his conversation with Leo Sterk should have been excluded. We find this error harmless, however, in light of Sterk's testimony that he could not recall telling Yapp that Laverty could not lower its price on Monsanto products for fear that its distributorship would be terminated. Moreover, there is sufficient independent evidence from which the jury reasonably could have found that Monsanto and other distributors conspired to boycott Spray-Rite. We do not believe that this one improperly admitted hearsay statement affected Monsanto's substantial rights. Rule 103, Fed. R. Evid.

C. *Exclusion of Rebuttal Witness*

Monsanto claims that the district court erred in refusing to permit Nate McGuire to testify during rebuttal. McGuire was not listed as a defense witness on the final

pretrial witness list, and Monsanto gave Spray-Rite only three days notice of its desire to call McGuire. The court ruled that the three day notice did not give Spray-Rite sufficient time to prepare to cross-examine McGuire. Moreover, Monsanto admitted that it could call another witness who had been listed on the pretrial list. The court ruled that permitting McGuire to testify under these circumstances would be manifestly unfair.

In ruling on a party's motion to call a witness not included on a pretrial witness list ordered pursuant to rule 16 of the Federal Rules of Civil Procedure, the district court should consider four factors:

(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;

(2) the ability of that party to cure the prejudice;

(3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;

(4) bad faith or willfulness in failing to comply with the court's order.

Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904 (3d Cir. 1977), *quoted in De Marines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1202 (3d Cir. 1978). The district court gave due consideration to these factors and concluded that permitting Monsanto to call McGuire would prejudice Spray-Rite because Spray-Rite did not have adequate time to prepare for the witness. Any prejudice to Monsanto engendered by excluding McGuire's testimony could be cured by the testimony of the other available, listed witnesses. Under these circumstances, the district court did not abuse its discretion in excluding McGuire's testimony. *Franklin Music Co. v. ABC*, 616 F.2d 528 (3d Cir. 1979).

D. *"Golden Rule" Appeal*

Monsanto argues that Spray-Rite's appeal to sympathy in its closing argument requires reversal. Spray-Rite

made the following appeal during its closing rebuttal argument:

> MR. JINKINSON: Ladies of the jury, I want to tell you that I'm not standing here before you with my hat in my hand asking you to give me something. I think this record shows that Spray-Rite and Don Yapp are entitled to substantial damages in this case. I only ask you in your consideration to take the position that if you traded seats with Don Yapp and he was in the box, I would ask him—
>
> MR. BARTLIT: I object to that as improper.
>
> MR. JINKINSON: —to give you the same consideration.—
>
> THE COURT: It is argument.
>
> MR. JINKINSON: —the same deliberation as you would if you were a plaintiff in this case, that's all we're asking. We want you to consider this thoroughly, impartially. We want you to—and I ask you to return a substantial verdict for my client, Spray-Rite Corporation.

Tr. at 4325-26.

A "Golden Rule" appeal in which the jury is asked to put itself in the plaintiff's position "is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978), *rev. on other grounds*, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956, *reh. denied*, 448 U.S. 912, *on remand*, 89 F.R.D. 322 (N.D. Miss. 1980). *Accord, Shroyer v. Kaufman*, 426 F.2d 1032, 1033 (7th Cir. 1970). Spray-Rite's counsel should have refrained from asking the jury to put itself in Spray-Rite's position when it decided how much to award Spray-Rite. The remark was clearly improper, but we are not convinced that it was so prejudicial that it deprived Monsanto of a fair trial. The appeal to sympathy was not repeated. *Klotz v. Sears, Roebuck & Co.*, 267 F.2d 53, 55 (7th Cir.), *cert. denied*, 361 U.S. 877 (1959). Moreover, the jury was properly instructed con-

cerning the law it should apply in determining liability and damages. We certainly do not condone Spray-Rite's argument, but we find that it was harmless error. *Shroyer v. Kaufman*, 426 F.2d 1032 (7th Cir. 1970).

No. 80-1621: Monsanto's appeal from the amended judgment.

Monsanto appeals from the district court's March 21, 1980 order granting Spray-Rite's motion to amend the judgment to assess costs and attorneys' fees against Monsanto. We affirm.

On February 21, 1980, the jury returned a verdict against Monsanto and awarded Spray-Rite $3,500,000 damages. The jury responded "yes" to each of three special interrogatories. After dismissing the jury, the court rendered judgment on the verdict. The court announced "that judgment is hereby entered on the verdict in the sum of $10,500,000.00." Later that day the court entered a more specific minute order stating, "Court enters judgment in favor of plaintiff on the jury's verdict. The Court trebles damages and assesses damages in the amount of $10,500,000.00 plus interest at the legal rate *and costs*." (Emphasis added.)

Because the jury returned a general verdict accompanied by responses to special interrogatories, the Clerk of the District Court was not empowered to enter judgment until he received an approved verdict form from the court.[16] On February 22, 1980, the clerk entered

[16] Rule 58, Fed. R. Civ. P., provides:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly ap-

(Footnote continued on following page)

judgment pursuant to the court's minute order. The clerk, however, mistranscribed the approved verdict form and deleted the court's reference to costs.[17]

On March 11, 1980, eighteen days after judgment was entered, Spray-Rite filed a motion to amend the judgment to assess costs and attorneys' fees. Monsanto contested the motion on the ground that it was untimely. Monsanto argued in the district court, as it does on appeal, that Spray-Rite's motion was a rule 59(e), Federal Rules of Civil Procedure, motion to amend the judgment.[18] Monsanto argued that the court lacked jurisdiction to grant the motion because it was not filed within ten days after entry of judgment.

The district court rejected Monsanto's argument and granted Spray-Rite's motion on March 21, 1980. The district court ordered the clerk to amend the judgment pursuant to rule 60(a), Federal Rules of Civil

---

[16] *continued*

prove the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

[17] The Judgment Order entered February 22, 1980, stated:

This action came on trial before the court and a jury, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is hereby entered against the defendant, Monsanto Company, and in favor of plaintiff, Spray-Rite Service Corporation, and assesses [sic] damages in the amount of $10,500,000.00 plus interest at the legal rate.

[18] Rule 59(e), Fed. R. Civ. P., provides:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Procedure.[19] On March 28, 1980, the clerk entered the amended judgment assessing damages of $10,500,000 plus interest at the legal rate and costs and attorneys' fees.

Rule 59(e) and rule 60(a) prescribe procedures for different types of post-judgment relief. A rule 59(e) motion, which must be filed within ten days after entry of judgment, seeks correction of an error of substantive law, *White v. New Hampshire Dept. of Employment Security*, ... U.S. ....., 50 U.S.L.W. 4255, 4257 (Mar. 2, 1982), whereas a rule 60(a) motion, which may be filed at any time, seeks correction of a clerical "error of transcription, copying, or calculation." *Bershad v. McDonough*, 469 F.2d 1333, 1336 (7th Cir. 1972).

To the extent that Spray-Rite's motion sought to amend the judgment to assess costs, the motion was governed by rule 60(a), not rule 59(e). The only relief sought was correction of the clerk's omission of the assessment of costs, which was included in the court's February 21, 1980 minute order. Because rule 60(a) contains no time limit, Spray-Rite's motion to amend the judgment to assess costs was timely, and the district court had jurisdiction to grant the relief it ordered.

We also believe that rule 59(e) does not govern Spray-Rite's motion to amend the judgment to assess attorneys' fees. The Supreme Court recently held that a post-judgment motion for attorneys' fees pursuant to 42 U.S.C. § 1988, which provides that a prevailing party in a civil rights suit shall recover "a reasonable attorney's fee as part of the costs," is not a rule 59(e) motion. *White v. New Hampshire Dept. of Employment Security*, ...

---

[19] Rule 60(a), Fed. R. Civ. P., provides, in pertinent part:

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

U.S. ....., 50 U.S.L.W. 4255 (Mar. 2, 1982). The court held that rule 59(e) only governs post-judgment motions seeking reconsideration of the decision on the merits. *Id.* at ..... The court reasoned that "[b]y contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *Id.*

Like 42 U.S.C. § 1988, section 4 of the Clayton Act, 15 U.S.C. § 15, provides that prevailing antitrust plaintiffs shall recover attorneys' fees as well as costs.[20] Because of the similarity of these two statutory provisions, we believe that the Supreme Court's reasoning in *White* applies in this instance. Spray-Rite's motion to amend the judgment to assess costs raised issues collateral to the merits of the antitrust cause of action "—issues to which rule 59(e) was never intended to apply." *White v. New Hampshire Dept. of Employment Security*, ... U.S. at ....., 50 U.S.L.W. at 4257 (Mar. 2, 1982). *Accord, Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980), *later appeal*, 655 F.2d 766 (7th Cir.), *cert. denied sub nom. Blinzinger v. Bond*, ... U.S. ..... (1981).

In this Circuit, a motion to amend the judgment to assess attorneys' fees which raises issues collateral to the merits of the cause of action is governed by rule 54(d), Federal Rules of Civil Procedure,[21] which "imposes no

---

[20] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States or in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, *and shall recover* threefold the damages by him sustained, and *the cost of suit, including* reasonable attorney's fees.

(Emphasis added.)

[21] Rule 54(d), Fed. R. Civ. P., provides:

> (d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing

(Footnote continued on following page)

time limit apart from an implicit requirement of reasonableness." *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 655 (7th Cir. 1981).[22] Spray-Rite's motion

---

[21] *continued*

party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

The Supreme Court in *White* declined to decide whether the motion to amend the judgment to assess attorneys' fees was governed by rules 54(d) and 58, Fed. R. Civ. P. *White v. New Hampshire Dept. of Employment Security*, ... U.S. ....., ..., 50 U.S.L.W. 4255 (Mar. 2, 1982). Instead, the Court noted that district courts could adopt local rules "establishing timeliness standards for the filing of claims for attorney's fees." *Id.* at ..... .

[22] In *Hairline Creations*, the plaintiff's motion to amend the judgment to assess attorneys' fees was based on 15 U.S.C. § 1117, which authorizes the court to award reasonable attorneys' fees to the prevailing party in a trademark violation case "in exceptional cases." We held that the plaintiff's motion was governed by rule 59(e) because the decision whether to assess fees was not collateral to the merits of the underlying cause of action.

> The exercise of discretionary authority to award attorneys' fees is inextricably intertwined with the factual and legal issues that the trial court resolves at judgment. Second, the award of attorneys' fees is merely one of several potential remedies for trademark violations. . . . A motion for attorneys' fees would, therefore, require the trial court to reexamine the basis of the judgment to determine if the "exceptional" requirement had been met so as to justify the remedy. This characterization of § 1117 leads inescapably to the conclusion that a post-judgment motion for attorneys' fees is a motion to alter or amend the judgment.

Id. at 658. We distinguished § 1117 from 42 U.S.C. § 1988, the attorneys' fees provision at issue in *White v. New Hampshire Dept. of Employment Security*, ... U.S. ....., 50 U.S.L.W. 4255 (Mar. 2, 1982), noting that attorneys' fees under § 1988 are in the nature of an equitable award which is governed by rule

(Footnote continued on following page)

was filed within eighteen days after entry of judgment. Monsanto has not alleged that it was prejudiced in any way by this delay or that the delay was unreasonable. The district court, therefore, did not err in granting Spray-Rite's motion to amend the judgment.

No. 80-2233: Spray-Rite's cross-appeal from the unamended judgment.

Spray-Rite cross-appeals from the judgment entered February 22, 1980, to the extent that it failed to assess costs and attorneys' fees. The amended judgment entered March 28, 1980, superseded the judgment entered February 22, 1980, and awarded Spray-Rite the relief it seeks in this cross-appeal. Accordingly, we dismiss Spray-Rite's cross-appeal.

No. 80-2624: Monsanto's appeal from the award of $895,747.80 in attorneys' fees.

Monsanto appeals from the October 17, 1980 district court order awarding Spray-Rite $895,747.80 in attorneys' fees.[23] Monsanto claims that the court erred in awarding fees (1) for time billed on issues for which no recovery was obtained, (2) for time billed on the question of fees, (3) for time billed for duplicative efforts, and (4) for time billed by paralegal assistants and law clerks. We agree that the district court erred in assessing attorneys' fees for time billed on issues for which Spray-Rite did not obtain recovery, and accordingly we affirm the judgment in part and reverse and remand in part.

---

[22] *continued*

54(d). Section 4 of the Clayton Act's award of attorneys' fees is more analogous to § 1988 than to § 1117 because both § 4 and § 1988 provide for recovery of attorneys' fees as of right if the plaintiff prevails. Section 1117, on the other hand, permits recovery of attorneys' fees only if the plaintiff prevails in an "exceptional" case.

[23] Monsanto does not appeal from that portion of the October 17, 1980 order awarding Spray-Rite $16,875.79 in costs.

The successful antitrust plaintiff is entitled to recover attorneys' fees as a matter of right. 15 U.S.C. § 15. The plaintiff bears the burden of establishing the amount of compensable attorney time reasonably devoted to prosecuting its cause of action. *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1216 (3d Cir. 1978). We will disturb the district court's decision regarding the amount of fees only upon a clear showing of abuse of discretion, *Prandini v. National Tea Co.*, 585 F.2d 47, 51 (3d Cir.), *on remand*, 80 F.R.D. 447 (W.D. Pa. 1978).[34] In exercising its discretion, the district court should consider "the reasonableness of the time spent by counsel, the extent of counsel's success, and the complexity of the case." *Waters v. Wisconsin Steel Workers*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

Spray-Rite's petition for fees requested a lodestar amount of $895,747.80. The billing records Spray-Rite attached to the petition detailed the individuals who worked on the case, the period of time during which they each participated in the preparation of the case, the amount of time expended by each individual, the nature of the work performed, and the hourly billing rate for each individual. Monsanto objected to several of the items included in the request. Both parties filed mem-

---

[34] The circuits that have addressed the issue all agree that a court of appeals may overturn a district court award of attorneys' fees to a successful antitrust plaintiff only upon a showing of abuse of discretion. *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *Merola v. Atlantic Richfield Co.*, 493 F.2d 292, 295 (3d Cir. 1974), *later appeal*, 515 F.2d 165 (3d Cir. 1975); *Alpine Pharmacy, Inc. v. Charles Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied sub nom. Patlogan v. Dickstein, Shapiro & Galligan*, 414 U.S. 1092 (1973); *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 358 F.2d 790, 794 (6th Cir. 1966); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

oranda with the court, and on October 17, 1980, the district court entered an order awarding Spray-Rite the total amount of attorneys' fees requested.

Monsanto claims that the district court abused its discretion by awarding Spray-Rite $63,370.25 for time billed by law clerks and paralegal assistants. Monsanto contends that paralegal fees may be recovered only to the extent that their billing is included as overhead in the lawyers' billing rates. We disagree.

Only two circuit courts of appeals have considered whether paralegal fees are recoverable under section 4 of the Clayton Act, 15 U.S.C. § 15. The Second Circuit reversed the district court award of paralegal fees holding that these fees "cannot be considered as input in the fee award determination." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974). The Ninth Circuit, however, affirmed the district court's award of paralegal fees. *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). The Ninth Circuit quoted with approval the following language from the district court's opinion:

> As a matter of practice, most attorneys engaged in the antitrust practice use such legal assistants, particularly in digesting and indexing discovery and trial materials, much of the work heretofore performed by relatively inexperienced lawyers . . . . As a matter of policy, the use of paralegal help in this fashion greatly reduces the cost of legal services to the public and thus is a practice to be encouraged.

Id. at 1210 n.19. We think the Ninth Circuit has adopted the better view and, accordingly, we hold that paralegal and law clerk fees are recoverable as a portion of the plaintiff's reasonable attorneys' fees. The court did not abuse its discretion in awarding Spray-Rite $63,370.25 in paralegal fees.

Monsanto also claims that the court erred in awarding attorneys' fees for time spent on the question of fees. Monsanto argues that Spray-Rite cannot recover for 73

hours spent on preparation of the fees petition or for 113.25 hours spent on amending the judgment to assess attorneys' fees. In support of its argument, Monsanto relies on *Locklin v. Day-Glo Color Corp.*, 378 F. Supp. 423, 429 (N.D. Ill. 1974), in which the district court held that "time devoted to compiling and presenting the bill is beyond the scope of effort for which fees are to be allowed." Other circuits, however, have rejected the *Locklin* court's view. *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir.), *on remand*, 80 F.R.D. 447 (W.D. Pa. 1978); *Perkins v. Standard Oil Co. of California*, 474 F.2d 549, 555 (9th Cir.), *cert. denied*, 412 U.S. 940 (1973). We likewise have held that time spent litigating the question of fees is compensable. *Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980), *later appeal*, 655 F.2d 766 (7th Cir.), *cert. denied sub nom. Blinzinger v. Bond*, ... U.S. ..... (1981) (fees pursuant to 42 U.S.C. §1988). We think that this is the better view.

> To the extent that courts prescribe procedures which must be exhausted before a successful plaintiff may obtain the fruit of his invocation of the judicial process, the expense of complying with such procedures is just as much a condition precedent to a litigant's obtaining the relief to which he is entitled as the outlay for court costs which litigants . . . must fork out before indulging in the privilege of seeking justice at the hands of a judicial tribunal. We therefore conclude that the time devoted by plaintiff's attorneys in prosecuting the fee application should not be excluded.

Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1179-80 (W.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The district court did not abuse its discretion in awarding Spray-Rite attorneys' fees for time spent on the issue of fees.

Monsanto further claims that the court erred in awarding Spray-Rite attorneys' fees for duplicative efforts. Monsanto contends that Spray-Rite's attorneys billed so many hours that there must have been a substantial duplication of efforts.

Spray-Rite's fee petition included a total of 13,400 hours billed. The trial of this case consumed six weeks. In view of the length of the trial and the concomitant time necessary for adequate preparation of the case, we find that the district court did not err in rejecting Monsanto's assumption that some of the billed hours were necessarily duplicative.

Finally, Monsanto claims that the court erred in awarding Spray-Rite fees billed for time spent on issues for which Spray-Rite did not obtain recovery. Spray-Rite's original complaint included four counts: a conspiracy to restrain trade count, 15 U.S.C. § 1, a Robinson-Patman Act discriminatory price count, 15 U.S.C. § 13(a), and two monopolization counts, 15 U.S.C. § 2. Spray-Rite dropped the Robinson-Patman and monopolization counts before trial. Monsanto argues that section 4 of the Clayton Act permits recovery of attorneys' fees only for time billed on issues on which the plaintiff prevailed. Monsanto contends that Spray-Rite cannot recover attorneys' fees for time expended on the Robinson-Patman and monopolization counts because Spray-Rite did not prevail on those charges. *See Bryam Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967).

"[O]nly work devoted to the successful recovery of treble damages may be compensated. However, to the extent that work bore on both a successfully asserted antitrust claim and other, noncompensable claims, that work may be fully taken into account." *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1057 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir. 1978) (citation omitted). Spray-Rite may recover for time expended on the Robinson-Patman and monopolization counts only if that work also bore on the successfully litigated conspiracy charge. To recover on the Robinson-Patman claim, Spray-Rite would have had to prove that Monsanto charged a discriminatory price within some limited, relevant market. Moreover, Spray-Rite would have had to have been prepared to rebut an affirmative defense that Monsanto's discriminatory price was needed

to meet competition. *Vance Beverages, Inc. v. Falls City Industries, Inc.*, 654 F.2d 1224 (7th Cir. 1981). To prevail on the monopolization counts, Spray-Rite would have borne the burden of proving that Monsanto possessed monopoly power in the relevant market and that Monsanto wilfully acquired or maintained that power. *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980). Both of these counts require substantially different proof than that necessary to sustain Spray-Rite's burden on the conspiracy to restrain trade count. Monsanto is not required to compensate Spray-Rite for time devoted exclusively to developing the Robinson-Patman and monopolization counts. Spray-Rite's petition did not indicate what portion of the billed time was devoted to developing the two abandoned theories. On remand Spray-Rite will bear the burden of showing which portion of the billed time was devoted to the successfully litigated conspiracy charge.

Conclusion

For the reasons stated in this opinion, we affirm the amended judgment of the district court against Monsanto if Spray-Rite will accept a remittitur of $172,412. If Spray-Rite refuses to accept the remittitur, the judgment will be reversed and the case remanded for a new trial on the question of damages. We dismiss Spray-Rite's cross-appeal, and affirm in part and reverse and remand in part the award of $895,747.80 in attorneys' fees.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

No. 82-277

Office - Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

—against—

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 407-8283

Counsel for Respondent
Sony Corporation of America

Of Counsel:

RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

ASA D. SOKOLOW
DOUGLAS N. GORDON
BRIAN G. LUSTBADER
ROSENMAN COLIN FREUND
LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

TABLE OF CONTENTS

	PAGE
Counterstatement of the Case	2
The Proceedings Below	3
I. THE COURT OF APPEALS REVIEWED THE FACTS RELATING TO THE ALLEGED CONSPIRACY AND CORRECTLY ENTERED JUDGMENT FOR SONAM	5
II. THE COURT OF APPEALS' "FIELD OF VISION" IS NOT PROPERLY BEFORE THIS COURT AND, IN ALL EVENTS, THAT "FIELD OF VISION" WAS PROPERLY CONFINED	9
III. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REMAND TO THE DISTRICT COURT FOR POSSIBLE CONSIDERATION OF A MOTION FOR A NEW TRIAL	14
Conclusion	17

TABLE OF AUTHORITIES

CASES:	PAGE
Battle v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982)	5, 7n, 8
Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947)	16n
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)	5
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	10
Duignan v. *United States*, 274 U.S. 195 (1927)	9-10
Edward J. Sweeney & Sons, Inc. v. *Texaco Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)	6n-7n
Eiberger v. *Sony Corporation of America*, 622 F.2d 1068 (2d Cir. 1980)	16
Galloway v. *United States*, 319 U.S. 372 (1943)	11-12
H.L. Moore Drug Exchange v. *Eli Lilly and Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. pending*, No. 81-2215 (May 28, 1982)	6, 11
Iacurci v. *Lummus Co.*, 387 U.S. 86 (1967)	5n
Michelman v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)	9, 11
Neely v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967)	14-15, 15n, 16n
Rogers v. *United States*, 422 U.S. 35 (1975)	10
Schwimmer v. *Sony Corporation of America*, 637 F.2d 41 (2d Cir. 1980)	2
Spray-Rite Service Corp. v. *Monsanto Co.*, 1982-2 Trade Cas. ¶ 64,808 (7th Cir. 1982)	5, 6, 6n, 8

PAGE

United States v. *Johnston*, 268 U.S. 220 (1925) 8

United States v. *Lovasco*, 431 U.S. 783 (1977) 10

United States v. *Ortiz*, 422 U.S. 891 (1975) 10

United States v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970) 14

Youakim v. *Miller*, 425 U.S. 231 (1976) 10

STATUTES:

Sherman Act:
Section 1, 15 U.S.C. § 1 1

Clayton Act:
Section 4, 15 U.S.C. § 15 3

OTHER AUTHORITIES:

Federal Rules of Evidence, Rule 403 14

L. Sullivan, *Antitrust* (1977) 7n

10 MOORE'S FEDERAL PRACTICE (2d ed. 1982) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-277

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

—against—

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION[1]

The central issue presented for review by the instant Petition is whether the Second Circuit properly assessed, under Section 1 of the Sherman Act, 15 U.S.C. § 1, the probative weight of petitioner's conspiracy evidence at trial—a factual question which has no significance to anyone but the parties. Petitioner's attempt to manufacture a conflict among the circuits with respect to the legal principles applied below is based upon a mischaracterization of the Second Circuit's holding; in fact, that holding is fully consistent with the prevailing law in the other courts of appeal.

1 For its designation pursuant to Supreme Court Rule 28.1, Respondent refers to its prior designation in this matter, dated July 22, 1982.

COUNTERSTATEMENT OF THE CASE

The Petition, in its statement of the case, fails to refer to the key undisputed facts which disclose what this case is truly about: whether a dealer can falsely obtain money from a supplier as part of a wide-ranging fraudulent scheme, refuse to make amends when caught, and then use the antitrust laws to insulate himself from any action by the supplier simply because other dealers have complained generally about a marketing practice in which he engaged.

Absent from the Petition is any reference to the prior decision of the Second Circuit in this matter, *Schwimmer* v. *Sony Corporation of America*, 637 F.2d 41 (2d Cir. 1980), where the Court of Appeals *affirmed summary judgment for Sonam* on its counterclaim to recover monies paid to petitioner as the result of false cooperative advertising claims. The court held on the undisputed facts that Sonam had been misled into reimbursing petitioner for advertising expenses which he had never incurred. (*Id.* at 44).

Nor was petitioner's conduct an isolated event. As the Second Circuit below described it:

> "Sonam quickly discovered that nine dealers, at least seven of which were transshippers, had submitted, through a company called Computer Cast, false claims to Sonam totaling nearly $500,000 for commercials supposedly carried on two New York radio stations. The audit revealed that the commercials had never been aired and that the radio station invoices submitted to Sonam by Computer Cast in support of the claims had been forged. One of the 'Computer Cast Nine' was [petitioner], which had been granted credits totaling more than $54,000.
>
> • • •
>
> "[Following suspension by Sonam,] eight of the dealers agreed to Sonam's terms [for reinstatement] in May or early June 1977. By mid-June seven of these eight dealers

had provided the requested affidavits and either made repayments or set up a schedule for repayment. Sonam shortly resumed selling to these seven dealers.

"The only dealer that refused from the outset to make repayment or to give an affidavit was [petitioner]. [Petitioner] never changed its position and in the absence of repayment and an affidavit, Sonam did not reinstate it. [Petitioner] remained suspended until its dealership agreement expired at the end of 1977." (677 F.2d 946, 949-50) (App. 9c, 11c). (footnotes omitted).[2]

Petitioner's antitrust claim is an attempt to parlay his fraudulent conduct into a multi-million-dollar treble-damage bonanza. The Second Circuit recognized this, properly ordering the dismissal of petitioner's antitrust claims for a failure of proof on the threshold Section 1 requirement of concerted action.

THE PROCEEDINGS BELOW

Following a jury finding that Sonam had conspired with some of its dealers to discourage transshipping and a verdict in petitioner's favor for $675,000 (which was then trebled pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15), the district court denied Sonam's motion for judgment *n.o.v.* Despite its characterization of petitioner's conspiracy evidence as "really dubious" (A792), the district court nevertheless held that the jury could properly infer that petitioner's termination was "a signal and a warning to transshippers and a means of putting pressure upon them" and "was motivated by the complaints of other customers." (App. 3b).

The Second Circuit unanimously reversed. (677 F.2d 946) (App. 1c-26c). Without reaching several other grounds prof-

---

2 "App." refers to the appendix to the Petition herein. References to "A __" are to the joint appendix in the Second Circuit.

fered by Sonam for reversal (677 F.2d at 952 n.10) (App. 15c n.10), the court (in an opinion by Circuit Judge Kearse, joined by Circuit Judge Newman and District Judge Daly) exhaustively reviewed the record in a light most favorable to petitioner and found "*no evidence* . . . from which the jury could reasonably have inferred that in 1976 or 1977 Sonam and any of its customers entered into an agreement, either express or tacit, to discourage transshipping." (677 F.2d at 953) (App. 18c) (emphasis added). Accordingly, the Second Circuit directed that judgment be entered for Sonam.

Petitioner sought and received additional time within which to seek rehearing by the Second Circuit, on the ground that more time was needed to review carefully "over 2000 pages of the trial record and exhibits" in order to prepare his rehearing petition. (May 12, 1982 Affidavit by petitioner's counsel at ¶ 5). Rehearing was *not* sought, however. Instead, on June 14, 1982, petitioner filed two motions with the Second Circuit: (1) to modify the opinion to "correct" two factual statements; and (2) to modify the judgment to permit petitioner to make a motion for a new trial on remand to the district court. On June 30, 1982, "[w]ithout necessarily accepting [petitioner's] characterizations of the record," the Second Circuit granted petitioner's motion to revise two factual statements in the opinion, but denied petitioner's motion to modify the judgment. (App. 1d, 1e).

On August 16, 1982, petitioner filed his Petition for a writ of certiorari.

I.

THE COURT OF APPEALS REVIEWED THE FACTS RELATING TO THE ALLEGED CONSPIRACY AND CORRECTLY ENTERED JUDGMENT FOR SONAM

Petitioner first suggests that the Court of Appeals misinterpreted *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*Sylvania*"), and that that supposed error led the Second Circuit into conflict with the Seventh Circuit's holding in *Spray-Rite Service Corp.* v. *Monsanto Co.*, 1982-2 Trade Cas. ¶ 64,808 (7th Cir. 1982) ("*Spray-Rite*") and the Eighth Circuit's holding in *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) ("*Battle*") that "proof of a dealer's complaints to the manufacturer . . . and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action." (Petition at 15) (emphasis in original). This characterization of the Second Circuit's opinion bears no resemblance to what the court actually held.

First, the court below did not misinterpret *Sylvania*. (*See* Petition at Question 1 and pages 4, 5, 13). *Sylvania* has nothing to do with the issue resolved by the Second Circuit—the requisite proof of concerted action under Section 1. Rather, the issue in *Sylvania* was whether defendant's contractual restraints were governed by a *per se* rule or the rule of reason. There was no question in *Sylvania* of the existence of concerted action; it was admitted. In fact, the Second Circuit did not even mention *Sylvania*.

Nor is there any conflict among the circuits. The Second Circuit did *not* hold that complaints by competing dealers to a supplier, *plus responsive action* are insufficient to go to the jury on the issue of a Section 1 conspiracy. (*See* Petition at 5, 12, 15, 16). What the Second Circuit held was that the record was insufficient to allow a jury to conclude that Sonam took *any action in response* to the complaints. As the court stated:

> "The facts of record as to what Sonam said to complaining customers, what complaining customers did fol-

lowing the Sonam responses, and what Sonam did with respect to transshipping dealers, are inconsistent with any inference that there was an agreement [between Sonam and its dealers] to discourage transshipping." (677 F.2d at 953) (App. 18c-19c).[3]

The Second Circuit's opinion can be searched in vain for the contrary "holding" that petitioner ascribes to it.

Indeed, the Seventh Circuit in *Spray-Rite* specifically considered the Second Circuit's opinion in *H.L. Moore Drug Exchange* v. *Eli Lilly and Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. pending*, No. 81-2215 (May 28, 1982)—upon which the court below relied for the applicable conspiracy principles (677 F.2d at 952) (App. 16c-18c)—and found no conflict. (1982-2 Trade Cas. at p. 71,985 n.8). The rule of law which petitioner espouses is the same in the Second Circuit as it is in the Seventh and Eighth Circuits—that, to quote petitioner, "proof of acts . . . in response to competitor complaints is sufficient" to go to the jury on the issue of concerted action under Section 1. (Petition at 5). What the Second Circuit held was that petitioner had failed to elicit any evidence of such responsive action to warrant submitting the case to the jury.[4]

---

3 For example, there was no evidence that any of the complaints mentioned petitioner specifically. (677 F.2d at 949) (App. 7c). Moreover, Sonam did not condition reinstatement of the dealers who submitted false cooperative advertising claims on a cessation of transshipping; indeed, there was no evidence that transshipping was even mentioned and Sonam reinstated several transshippers who had submitted false claims. (677 F.2d at 954) (App. 20c-21c). And there was no evidence that Sonam terminated the dealership of any transshipper other than in connection with the cooperative advertising fraud that resulted in petitioner's termination. (677 F.2d at 954) (App. 20c).

4 In support of its position, petitioner attempts to bootstrap *dictum* by the Third Circuit in Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), into a conflict between the Second Circuit's opinion, on the one hand, and the Seventh Circuit's opinion in *Spray-Rite* and the Eighth Circuit's

In so holding, the Second Circuit did not, as petitioner suggests (Petition at 17, 18), impose a direct-evidence requirement for proving an antitrust conspiracy. Indeed, the court expressly stated:

> "Conspiracies, of course, are rarely evidenced by explicit agreements, but must almost always be proved by 'inferences that may be fairly drawn from the behavior of the alleged conspirators.' " (677 F.2d at 953) (App. 17c) (citations omitted).[5]

---

opinion in *Battle*, on the other. According to petitioner, since the Second Circuit cited *Sweeney* approvingly, and since *Sweeney* suggested that even proof of responsive action to complaints might not be enough to infer concerted action, "both [the Second and Third] circuits now require more than a causal link between complaints and response in order to establish a conspiracy." (Petition at 15). In fact, however, the Second Circuit cited *Sweeney* only for the propositions that "a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, [does not] support a finding of conspiracy with them," and that "where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement." (677 F.2d at 953) (App. 17c-18c). And, as the Second Circuit found, the record here is barren of any evidence demonstrating that Sonam's actions were taken in response to customer complaints. Moreover, the language in *Sweeney* relied upon by petitioner is dictum; the Third Circuit in *Sweeney* found no evidence of *action taken in response* to the complaints. (637 F.2d at 111, 115, 116-17).

5 The Second Circuit's use of the word "agreement"—heavily relied upon by petitioner (Petition at 14 & n.19, 16)—did not evidence the adoption of a direct-evidence standard. The court also used the words "conspiracy" (*e.g.*, 677 F.2d at 947, 952 & n.10, 953; App. 2c-3c, 15c & n.10, 16c-17c, 18c), "contract," "combination" (*e.g.*, 677 F.2d at 952; App. 16c-17c) and "concerted action" (*e.g.*, 677 F.2d at 952; App. 16c). The interchangeable use of these words is perfectly consistent with the well-settled view that they all refer to the single requirement under Section 1 that there be proof of more than unilateral action. *See* L. Sullivan, *Antitrust* § 109 at p. 312 (1977) (" 'contract . . . , combination or conspiracy' becomes an alliterative compound noun, roughly translated to mean 'concerted action' ").

In sum, in *Spray-Rite* and *Battle*, after reviewing the evidence, the courts concluded that there was sufficient proof that defendants had *acted in response* to dealers' complaints to raise a reasonable inference of concerted action. In contrast, the court below, after assessing a different record, concluded that there was insufficient evidence of *responsive action* to raise such an inference; indeed, the court held that the facts were "inconsistent" with such an inference. (677 F.2d at 953) (App. 18c-19c). The difference in result between this case and *Spray-Rite* and *Battle* is not due to the application of conflicting legal principles; it is due to petitioner's failure of proof. The Second Circuit's opinion makes clear that it engaged in a detailed factual review of the evidence most favorable to petitioner; it did not perceive that any grave issues of law were involved.[6] This is not a matter for certiorari. As Mr. Justice Holmes declared in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), "[w]e do not grant a certiorari to review evidence and discuss specific facts."

---

6 The lengths to which petitioner has gone to develop a conflict among the circuits is demonstrated by his distortions of the Second Circuit's opinion. For example, the court did not concede, as petitioner suggests, that there was some evidence of actions by Sonam in response to the complaints. (Petition at 12). On the contrary, in the portion of the opinion cited by petitioner, the court noted that the evidence from Sadowy—plaintiff's own lead witness and the Sonam employee who orchestrated the cooperative advertising fraud on Sonam (677 F.2d at 949-50) (App. 9c-10c)—showed nothing more than conversations between Sonam and two accounts (Macy's and A&S) in which those accounts complained to Sonam about transshipping generally. The court explained that Sadowy's testimony established that Macy's brought out their own brand because of a *lack* of response by Sonam; and that although Sadowy testified that a Sonam executive "tried to assure [A&S that Sonam was] working on programs to help [it] out," Sadowy also explained that A&S "stopped buying Sony's products at that point," rebutting any inference that those conversations led to any *action* by Sonam *in response* to A&S's complaints. (677 F.2d at 948 & n.4) (App. 6c-7c & n.4).

II.

THE COURT OF APPEALS' "FIELD OF VISION" IS NOT PROPERLY BEFORE THIS COURT AND, IN ALL EVENTS, THAT "FIELD OF VISION" WAS PROPERLY CONFINED

Petitioner's assertion that certiorari should be granted to resolve a conflict among the circuits concerning the "field of vision" to be applied by the courts of appeals in reviewing the grant or denial of judgment *n.o.v.* is equally without merit for two independently sufficient reasons.

First, petitioner never raised this argument below, although given ample opportunity to do so. Sonam set forth the proper standard of appellate review in its opening brief to the Second Circuit, citing and quoting from *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976), which the court below, in turn, quoted. (677 F.2d at 952) (App. 17c). Petitioner never quarreled with Sonam's statement of that standard in his Second Circuit brief.

Thereafter, petitioner sought additional time within which to petition the Second Circuit for rehearing "on a number of grounds," *including* "the proper standard of appellate review." (May 12, 1982 Affidavit by petitioner's counsel at ¶ 4). However, petitioner did *not* seek rehearing to challenge the Court of Appeals' "field of vision." And, although petitioner made two different motions to the Second Circuit on June 14, 1982, petitioner still did not raise his "field of vision" argument. In fact, petitioner concedes that the Second Circuit did not address the question. (Petition at 12; see *id.* at 21 n.34). Rather, petitioner sat back and waited until he filed his petition with this Court to raise the "field of vision" issue for the first time.

It is well settled that "[t]his Court sits as a court of review. It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States*,

274 U.S. 195, 200 (1927). *Accord, Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 (1977); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). This is not such an exceptional case—a category which has been strictly limited to assertions directly involving constitutional rights or gross injustice. *Youakim* v. *Miller*, 425 U.S. 231, 233-34 (1976); *Rogers* v. *United States*, 422 U.S. 35, 41 (1975).

In all events, the Second Circuit applied the proper standard of review, stating:

> "The function of an appellate court reviewing the denial of a judgment n.o.v. is essentially the same as the function of the trial court in ruling on the judgment n.o.v. motion. *Both courts must determine whether the evidence, viewed in the light most favorable to the party that secured the verdict, was sufficient to allow a reasonable juror to arrive at the verdict rendered. H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981); 5A Moore's Federal Practice ¶ 50.07[2] (2d ed. 1981). As we stated recently in the *Eli Lilly* case, 'we must determine, *without weighing the credibility of the evidence but viewing it most favorably to the plaintiff*, whether "there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice Par. 50.07[2] (2d ed. 1980); see also *Beech Cinema* v. *Twentieth Century-Fox Film*, 622 F.2d 1106, 1107-08 (2d Cir. 1980). *To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury.*
>
> "If, however, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in his favor, our duty is to reverse the judgment below. The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." *Michelman* v. *Clark-Schwebel Fiber*

> *Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976).'
>
> 662 F.2d at 940-41. *Our review of the record in the present case convinces us that, even after drawing all permissible inferences in favor of Schwimmer, there was insufficient evidence from which the jury could rationally conclude that Sonam had entered into an unlawful conspiracy.*"

(677 F.2d at 951-52) (App. 14c-15c) (emphasis added; footnote omitted).

It is thus plain that the Second Circuit considered only the evidence viewed most favorably to petitioner in reaching its decision. Hanging all his hopes on the single phrase "all the evidence" in the court's quote from *Michelman*, petitioner contends that the court in fact reviewed *all* the evidence, *not just that most favorable to petitioner.* (Petition at 21 & n.34). Petitioner conveniently ignores, however, the fact that the very phrase was immediately modified as follows: "after viewing *all* the evidence *most favorably to plaintiff* . . . ." Petitioner's effort to elevate semantics above substance is unavailing. Indeed, in *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. pending*, No. 81-2215 (May 28, 1982), Moore's counsel (the same counsel as petitioner's herein) adopted the very field of vision used by the Second Circuit in this case: "[W]hen all of the evidence is in fact viewed in the light most favorable to Moore . . . ." (Nov. 20, 1981 Petition For Rehearing in *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, No. 81-7090 (2d Cir.) at 12).

There are no "magic words" which describe the standard for review of the grant or denial of judgment *n.o.v.* As this Court explained in *Galloway* v. *United States*, 319 U.S. 372, 395 (1943), in affirming judgment *n.o.v.* for defendant:

> "[S]tandards . . . cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one

> general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence,' or vice versa. *The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.* The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the [Seventh] Amendment requires to be followed." (Emphasis added) (footnotes omitted).

The Second Circuit evaluated the evidence in the light most favorable to petitioner, gave petitioner the benefit of all reasonable inferences, and concluded that there was "*no evidence* in the record" to support a reasonable inference that Sonam conspired with its dealers to discourage transshipping. (677 F.2d 953) (App. 18c) (emphasis added). The court did not, as petitioner states, "consider contradicted and impeached testimony. . . ." favorable to Sonam. (Petition at 23). Indeed, the court did not even find it necessary to rely upon uncontradicted and unimpeached evidence favorable to Sonam to point out the insufficiency of petitioner's case-in-chief.

The very examples relied upon by petitioner demonstrate that the court did not go beyond the evidence favorable to petitioner in concluding that there was no reasonable basis for an inference that Sonam and its dealers conspired to discourage transshipping. Thus, for instance, the court did not rely on Sonam's witnesses (Petition at 21) to support its conclusion that Sonam did not take any action in response to the dealer complaints. The court specifically examined at length the testimony of Sadowy, *petitioner's own lead witness*, and concluded that Sadowy's testimony "negative[d]" any

inference of responsive action by Sonam. (677 F.2d at 948 & n.4) (App. 5c-7c & n.4).[7]

Similarly, the documentary evidence cited by petitioner (Petition at 21) merely indicated that Sonam would try to help a complaining dealer with its marketing problems. Without more—without proof that Sonam in fact took any action in response to this complaint—this letter does not give rise to an inference of a conspiracy to discourage transshipping.[8]

Finally—to avoid burdening this Court with a point-by-point rebuttal of all petitioner's misleading examples—the inference of conspiracy which petitioner seeks from his low credit line was rebutted by *petitioner's own concession* that his financial statement was weak and by *evidence introduced by petitioner* showing that other transshippers had high credit lines. (677 F.2d at 955) (App. 21c-22c) (*see* A1039-45, Plaintiff's Exhibit 72; A1065-66, Plaintiff's Exhibit 131).

Thus, an examination of the Court of Appeals' application of the standard of review demonstrates that no intervention by this Court is appropriate.

---

7 The court went on to refer to testimony of Sonam's witnesses consistent with a lack of responsive action. Since it was petitioner's burden to prove responsive action by Sonam, the court did not *rely* on the testimony by Sonam's witnesses to prove a *lack* of responsive action; that was not Sonam's burden.

8 Again, the court's reference to the testimony of a Sonam witness merely confirmed the lack of responsive action. Put another way, without more, petitioner's proof was insufficient.

III.

THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO REMAND TO THE DISTRICT COURT FOR POSSIBLE CONSIDERATION OF A MOTION FOR A NEW TRIAL

Petitioner's third claim is that the Second Circuit erred in denying his motion to modify the judgment to permit the district court to *reconsider* the admissibility of two items of evidence which it had excluded at trial and, then, if the evidence were deemed admissible in light of the Second Circuit's holding, to allow the district court to consider a motion by petitioner for a new trial.

Petitioner concedes that the two items of evidence were excluded by the district court in the exercise of its discretion pursuant to Rule 403 of the Federal Rules of Evidence. (Petition at 26). Petitioner has never challenged those exclusions as reversible error. That is not surprising since a reversal for abuse of discretion under Rule 403 is unheard of "in all but rare cases of egregious abuse." 10 MOORE'S FEDERAL PRACTICE § 403.02[4] at IV-74 (2d ed. 1982). *Accord, United States* v. *Ravich*, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

Instead, petitioner asked the Court of Appeals to remand and allow the district court: first to reconsider two evidentiary rulings; and then to grant a new trial *if* it reversed its prior rulings and allowed the evidence to be admitted—the theory being that those two extra bits of evidence would somehow raise a jury question on the issue of conspiracy.

Plaintiff's argument is untenable. The Court of Appeals was well within its authority under this Court's precedents to deny petitioner's motion. As this Court recognized in *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967), in most cases it is within the discretion of the Court of Appeals to rule on a request for a new trial made by a party, such as petitioner, who has successfully resisted a motion for judgment *n.o.v.* in

the district court, only to lose on that issue in the Court of Appeals. *Neely* held that in a case such as this one—where the erroneous exclusion of evidence is asserted as the basis for a new trial—the issue is ripe for disposition by the Court of Appeals:

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. . . . [T]here remain important considerations which may entitle [the plaintiff-appellee] to a new trial. The *erroneous exclusion of evidence* which would have strengthened his case is an important possibility. . . . *But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal. The district court in all likelihood has already ruled on these questions in the course of the trial and, in any event, has no special advantage or competence in dealing with them. They are precisely the kind of issues that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court.* Cf. *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 574 . . . . *Final action on these issues normally rests with the court of appeals.*" (386 U.S. at 327-28) (emphasis added).[9]

Neely thus not only authorizes, but encourages, Courts of

---

9 Iacurci v. Lummus Co., 387 U.S. 86 (1967), fell into that limited class of cases described in *Neely* where the Court of Appeals should not decide the new trial issue in the first instance. The right to a new trial in *Iacurci* turned on the jury's failure to follow the instructions contained in the special interrogatory submitted to it by the district court. Because no explanation for that failure was suggested by the record on appeal, the Court of Appeals was in a much poorer position than the district court to evaluate the new trial issue. *Iacurci* therefore is not inconsistent with *Neely*.

Appeals to resolve new trial requests based on the exclusion of evidence. And that is precisely what the Second Circuit did.[10]

Moreover, even if the two items of excluded evidence relied upon by plaintiff—(1) the Second Circuit's decision involving different products in *Eiberger* v. *Sony Corporation of America*, 622 F.2d 1068 (2d Cir. 1980), and (2) Sonam's contacts with the Manhattan District Attorney—had been before the jury, there still would not have been "a reasonable basis for an inference that in 1976 or 1977 Sonam and its dealers had entered into an agreement to discourage transshipping." (677 F.2d at 956) (App. 26c). The *Eiberger* decision and the contacts with the Manhattan District Attorney were proffered at trial by petitioner on the issue of Sonam's intent. Petitioner concedes as much, asserting that the evidence went to the issue of Sonam's motive, "plan and intent." (Petition at 26). The excluded evidence has no probative value on the issue of conspiracy, the crucial issue in the Court of Appeals.

---

10 Contrary to petitioner's assertion (Petition at 26), Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947), was clarified by *Neely* and limited to the proposition that a Court of Appeals is without power to direct entry of judgment for defendant where the defendant fails to move for judgment *n.o.v.* below, but only moves for a new trial. (386 U.S. at 324). That, needless to say, is not the case here.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: September 29, 1982

Respectfully submitted,

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 407-8283

Counsel for Respondent
Sony Corporation of America

Of Counsel:

RANDOLPH S. SHERMAN
IRA S. SACKS
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

ASA D. SOKOLOW
DOUGLAS N. GORDON
BRIAN G. LUSTBADER
ROSENMAN COLIN FREUND
LEWIS & COHEN
575 Madison Avenue
New York, New York 10022

PROOF OF SERVICE

I, Joshua F. Greenberg, counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, certify that on September 29, 1982, I served copies of the foregoing Brief In Opposition by hand on I. Scott Bass, 747 Third Avenue, New York, New York 10017, attorney for Petitioner. I further certify that all parties required to be served have been served.

Dated: September 29, 1982

JOSHUA F. GREENBERG
425 Park Avenue
New York, New York 10022
(212) 407-8283

Counsel for Respondent
Sony Corporation of America

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,

No. 82-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER SUPERSONIC ELECTRONICS CO.

I. SCOTT BASS
Counsel of Record for Petitioner
Supersonic Electronics Co.
747 Third Avenue
New York, New York 10017
(212) 751-9494

Of Counsel:
PROF. MARK F. POMERANTZ
MILTON A. BASS
JACOB LAUFER
IRVING L. WIESEN
Bass, Ullman & Lustigman

(13048)

TABLE OF CONTENTS

	PAGE
I. THE SECOND CIRCUIT'S HOLDING WITH REGARD TO CONSPIRACY IS IN CONFLICT WITH HOLDINGS OF OTHER CIRCUITS	1
II. THE COURT SHOULD RESOLVE THE "FIELD OF VISION" ISSUE, WHICH WAS RAISED AND RULED UPON BELOW	5
III. THE COURT OF APPEALS SHOULD HAVE REMANDED THE NEW TRIAL ISSUE FOR DETERMINATION BY THE DISTRICT COURT, IN THE FIRST INSTANCE	7
CONCLUSION	8

TABLE OF CITATIONS

	PAGE
Cases	
A.G. Rogers Co. v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980)	2
Battle v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982)	2
In re Russell Stover Candies, Inc., Dkt. No. 9140, _FTC_, 7/1/82	4n
Modern Home Institute v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975)	2
Neely v. *Eby Construction Co.*, 386 U.S. 317 (1967)	7
Schwimmer v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982)	2n
Spray-Rite Service Corp. v. *Monsanto Corp.*, _F.2d_, 1982-2 Trade Cas. [CCH] ¶64,808 (7th Cir. 1982)	2n
Edward J. Sweeney & Sons v. *Texaco*, 637 F.2d 105 (3d Cir. 1980) *cert. denied*, 451 U.S. 911 (1981)	2
United States v. *Generes*, 504 U.S. 93, 113 (1972)	7
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)	4
Miscellaneous	
Bohling, *Franchise Termination Under the Sherman Act: Populism and Relational Power*, 53 Texas L. Rev. 1180, 1212 (1975)	1n
National Economic Research Associates, Inc., *A Statistical Analysis of Private Antitrust Litigation: Final Report* (Oct. 1979)	1n
Piraino, *Distributor Termination Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297 (1982)	1n,4n,6
Turner, *The Re-Definition of Agreements Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 688 (1962)	4n

No. 82-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THEUNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER SUPERSONIC ELECTRONICS CO.

I

THE SECOND CIRCUIT'S HOLDING WITH REGARD TO CONSPIRACY IS IN CONFLICT WITH HOLDINGS OF OTHER CIRCUITS

The conflict among the circuits with respect to defining "concerted action" in the realm of manufacturer-dealer anti-competitive conduct[1] is clear and indisputable:

[1] Anti-competitive conduct in these relationships has a pervasive effect throughout the entire economy. Studies also show that by far the largest segment of private antitrust litigation concerns disputes between manufacturers and dealers who distribute their products. *See, e.g.*, National Economic Research Associates, Inc., *A Statistical Analysis of Private Antitrust Litigation: Final Report*, prepared for ABA Section of Antitrust Law (Oct. 1979) at 31. *See also*, Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 Texas L. Rev. 1180, 1212 (1975); Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297 (1982).

The Second Circuit:

"Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them. *Modern Home Institute* v. *Hartford* [513 F.2d 102 (2d Cir. 1976)], *supra; Edward J. Sweeney & Sons* v. *Texaco* [637 F.2d 105 (3d Cir. 1980)], *supra; A.G. Rogers Co.* v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980)."[2]

The Seventh & Eighth Circuits:

"We believe, however, that proof of termination following competitor complaints is sufficient to support an inference of concerted action. In *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), the Eighth Circuit declined to follow *Sweeney* and held 'that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action.' *Id.* at 991 (emphasis in original). We agree." (footnotes omitted).[3]

Sony's denials to the contrary notwithstanding, it was undisputed below that Sony both promised, and thereafter attempted by various actions, to comply with requests and pressure from its distributors for curbs on transshipping and discounting.[4] Sony's President decided to "put the clamps on the transship-

---

[2] *Schwimmer* v. *Sony*, 677 F.2d 946, at 953. (2d Cir. 1982). The court held that proof of responsiveness was insufficient under section 1 because it allegedly had not "led to any agreement." [App. C, p. 6c, n.4).

[3] *Spray-Rite Service Corp.* v. *Monsanto Corp.*, _F.2d_, 1982-2 Trade Cas. [CCH] ¶64,808 at p. 71,984 (7th Cir. 1982). *See* App. C., p.15g.

[4] As the Second Circuit noted, "There was ample proof that Sonam's dealers complained about transshipping." 677 F.2d at 953. [App. C., p.15c.] As the Court also noted, Sony's Vice President "tried to assure [Kagan] we were working on programs to help him out at that meeting and that there were going to be changes in our program to help reduce the transshipping and price cutting. We were going to have some stability." 677 F.2d at 948. [App. C., p.5c.]

pers",[5] and Sony's Vice President admitted that Sony was "slowly putting the pressure on."[6] Sony began by withholding certain popular models of its products from the petitioner and from most of the transshipper accounts. When this method proved insufficient to halt transshipping and discounting in general, Sony executives tried "not legal means",[7] and imposed direct limitations on the credit line of petitioner.

Petitioner, one of Sony's largest transshippers, was further ordered outright to halt its sales to Florida,[8] with the warning that any continuing transshipments would cause Sony to "clamp him up completely."[9] When such action against *one* of its largest transshippers also did not sufficiently satisfy its complaining department stores, Sony's President expanded the effort to reach *nine* of its large transshippers and discounters. This was accomplished by way of selective enforcement against these nine of a previously unenforced provision of its advertising program. Finally, Sony restricted *all* transshippers by means of an outright prohibition on transshipping in its dealer contract. 677 F.2d at 947, n.1. [App.C., p.4c, n.1.]

Sony's argument that no responsive action was taken to satisfy their dealers' pressure is thus an erroneous interpretation of the Second Circuit's opinion.[10] The essence of the lower court's conflict with the Seventh and Eighth Circuits can be simply stated: In the Seventh and Eighth Circuits the *jury's* finding that Sony's anticompetitive actions were taken in response to the complaints would be sufficient to establish concerted action under §1 of the Sherman Act. In the Second Circuit, however,

---

[5] Tr.1194.

[6] Tr.1194.

[7] Tr.550.

[8] Tr.313.

[9] Tr.316.

[10] The District Court found: "Nor is this a case where the evidence is of complaints without proof of a response by the defendants." 1980-81 Trade Cas. [CCH] ¶63,766, at p. 78,088 (E.D.N.Y. 1981) [App. B, p. 3b]. The Court of Appeals did not dispute this holding.

such responsive action, although found by the jury,[11] was insufficient to establish a conspiracy.

The Second Circuit required "other evidence of a tacit understanding or agreement."[12] Yet, this Court has pointed out that "conspiracy" need not reflect the type of prior agreement which Judge Kearse requires. Rather, conspiracy may be formed by "pressure" by a manufacturer on its dealers, or vice versa, and acquiescence or response thereto. *See United States* v. *Parke, Davis Co.*, 362 U.S. 29 (1960).[13]

The Second Circuit, rejecting coerced compliance as a basis for conspiracy, therefore, believed that threats by department stores to stop buying Sony's products if Sony did not halt the transshipping, was inconsistent with the idea that the parties *agreed* on an approach to the problem. That some of the stores made good on their threats in the face of Sony's initial failures to solve the problem, should have confirmed the existence of a pressure-type conspiracy. Instead, the Second Circuit erroneously concluded that as a matter of law, "A & S's actions thereafter *negative any inference* that the general 'assur[ances]' attributed to Steiner signified, or led to, any agreement between Sonam and A & S on the elimination of transshipping." 677 F.2d at 948, n.4. (emphasis added). *See* App. C., p.6c.

---

[11] "The fact-finder may play a particularly important role in dealer termination cases, where anticompetitive purposes such as eliminating price-cutters may differ little from such possible procompetitive purposes as eliminating 'free riders,' and the 'evidence will often reflect what counsel advise businessmen their purpose should have been.' [citations omitted]. In such cases, the fact-finder should be allowed to weigh the conflicting inferences and the credibility of witnesses to determine the parties' actual intent." Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell Law Review 297, 314, n.80 (1982).

[12] 677 F.2d at 953. [App.C., p.18c.]

[13] For a comprehensive discussion of this issue, *see*, *In re Russell Stover Candies, Inc.*, Dkt. No. 9140, _FTC_, 7/1/82 ("The Court in *Parke, Davis*, in finding liability, reiterated that there was no requirement for a Sherman Act violation to find an express or implied agreement."). *See also*, Turner, *The Re-Definition of Agreements Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 688 (1962), which argues against excluding coerced compliance from the definition of conspiracy under the Sherman Act.

The position of the Seventh and Eighth Circuits which allows conspiracy to be inferred from actions found to be taken in response to complaints and dealer pressures is thus consistent with this Court's prior holdings. The Second Circuit's rule is inconsistent with such holdings and will allow manufacturers to take anti-competitive action in response to their dealers' demands without fear of antitrust liability. Certiorari should be granted to resolve this conflict between the Circuits and to set aside the Second Circuit's ruling.

II

THE COURT SHOULD RESOLVE THE "FIELD OF VISION" ISSUE, WHICH WAS RAISED AND RULED UPON BELOW

The Second Circuit applies the "all the evidence" approach to judgment n.o.v. motions and used it as a vehicle for setting aside the jury verdict in this case. This was possible only because this Court has not recently defined an appropriate evidentiary "field of vision" in resolution of the established conflict among the circuits.[14] The absence of such a definitive guideline by this Court has been acutely felt in the antitrust field. As recently noted by a leading commentator:

> "Such decisions are inconsistent with the courts' traditional deference to the fact-finder in antitrust actions. In other antitrust areas, the fact-finder has been allowed to infer the existence of an agreement from

---

[14] Respondent does not deny the conflict among the circuits concerning the evidentiary "field of vision" to be applied in ruling on j.n.o.v. motions. In an attempt to short circuit review of this issue, Sony advances the spurious argument that this issue was not raised below. Sony's brief in the Court of Appeals did indeed argue that the Second Circuit should accept the testimony of Sony's witnesses. Petitioner's brief, however, argued that the Court should not credit such testimony and should uphold the jury verdict based upon the evidence advanced by petitioner in support of its case. The trial court also took this position. [App. B, p.3b] The "field of vision" issue thus was raised below, and the Court of Appeals elected to accept Sony's position in direct opposition to the holding of the trial court.

> ambivalent conduct. Because direct evidence of an illegal agreement is rarely available in today's sophisticated business climate, courts have permitted the inference of a conspiracy from circumstantial evidence. . . . In several mixed termination cases, however, the terminated distributor has presented prima facie evidence of conspiracy, yet the courts have refused to allow the jury to decide the question of conspiracy." Piraino, *Distributor Termination Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297, 314-15 (1982).

Sony's attempt to defend the Second Circuit's holding on the ground that it ostensibly considered the evidence "in the light most favorable" to petitioner is misplaced. The Second Circuit explicitly considered all of the evidence "without weighing the credibility of the evidence," 677 F.2d at 952 [App. C, 15c], *i.e.*, all of Sony's conflicting testimony was placed on an equal footing with plaintiff's evidence. Viewing and accepting the testimony of Sony's hostile and interested witnesses "in the light most favorable" to petitioner is thus meaningless. The Court should have rejected any such adverse testimony on the ground that the jury was entitled to disbelieve it, as the District Court in fact held. [App. B, p.3b.][15]

Employing the "all the evidence" standard, the Second Circuit elevated Sony's testimony over plaintiff's evidence to "negative any inferences" from plaintiff's testimony.[16] Even in the absence of contrary Sony testimony, plaintiff's primary evidence was negatived because it was "not confirmed." *Id.*[17]

The Second Circuit has thus carried the "all the evidence" standard to an unprecedented extreme. This Court in the exer-

---

[15] *See also* Petition for Certiorari, p.23, n.39.

[16] 677 F.2d at 948, n.4. [App. C, p.6c]

[17] The Court noted that a Sony executive who might have testified in Sony's favor had died before the taking of any depositions. 677 F.2d at 948, n.4. [App. C, p.6c] This was used to explain why the Court rejected plaintiff's most important evidence, even in the absence of contradictory testimony.

cise of its supervisory jurisdiction should now intervene to define the evidentiary "field of vision" and, as urged by the commentators,[18] thereby end the uncertainty and potential for abuse inherent in the divergent standards currently being applied.

III

THE COURT OF APPEALS SHOULD HAVE REMANDED THE NEW TRIAL ISSUE FOR DETERMINATION BY THE DISTRICT COURT, IN THE FIRST INSTANCE

Respondent confirms the need for certiorari to clarify the meaning of *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967). Sony claims that *Neely* not only authorizes, but *encourages*, courts of appeal to resolve new trial requests as a matter of course. This view, adopted by the Second Circuit below, was *expressly rejected* by the author of the *Neely* opinion, Justice White, in his separate opinion in *U.S.* v. *Generes*, 504 U.S. 93, 113 (1972), which respondent wholly fails to mention.

In *Generes*, Justice White specifically pointed out that *Neely* was *not* intended to usurp the established role of the trial court in making new trial determinations and that evidentiary determinations precisely such as those at bar should be resubmitted for the trial court's initial consideration. Certiorari should, therefore, be granted on this issue as well.

---

[18] *See* Petition for Certiorari, pp.19-20, n.30; 9 C. Wright & A. Miller, Federal Practice and Procedure §2526 at 556, 559.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, we respectfully request that a writ of certiorari issue herein.

Respectfully submitted,

I. SCOTT BASS
Counsel of Record for Petitioner
747 Third Avenue
New York, New York 10017
(212) 751-9494

Of Counsel:
PROF. MARK F. POMERANTZ
MILTON A. BASS
JACOB LAUFER
IRVING L. WIESEN
Bass, Ullman & Lustigman